SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 219

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

THE CONONIAL TRUST COMPANY, EXECUTOR OF THE WILL OF GLENN T. BRADEN, DECEASED

No. 220

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE WILL OF GLENN T. BRADEN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Western Pennsylvania	1	1
Docket entries	1	1
Judgment	2	1
Statement of claim	3	2
Note re exhibits	24	12
Amendment to statement of claim	24	12
Note re exhibit	27	13
Affidavit of defense	27	13
Defendant's motion to strike	29	15
Agreement re motions to strike	30	15
Stipulation re amendments, etc	31	16
Exhibit 1—Regulations to govern the leasing of lands in the Osage Reservation, Okla., for oil and gas mining purposes	35	18

	Original	Print
Record from D. C. U. S., Western Pennsylvania—Continued.		
Opinion, Thomson, J	82	41
Stipulation re printing record and abiding by the decision of No. 3272 Law	94	47
Assignments of error	95	48
Stipulation re printing record	96	48
Clerk's certificate [omitted in printing]	98	49
Proceedings in U. S. C. C. A., Third Circuit	99	49
Argument and submission [omitted in printing]	99	49
Opinion, Buffington, J	100	50
Judgments	103	52
Clerk's certificate [omitted in printing]	105	53
Order allowing certiorari	106	53

1 In United States District Court, Western District of Pennsylvania

Docket entries

Among the rolls, records, and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, at No. 3272 Law, may be found the following words and figures:

April 4, 1925, præcipe for summons and plaintiff's statement filed. Summons in assumpsit issued, returnable to first Monday of April, 1925.

April 6, 1925, writ returned served on D. B. Heiner, collector of internal revenue, together with copy of plaintiff's statement of claim, by handing to and leaving a true and attested copy thereof with D. B. Heiner, personally, at Pittsburgh, Pa., April 4, 1925.

April 13, 1925, præcipe for appearance of Walter Lyon, U. S. Atty., and Warren H. Van Kirk, spec. asst. U. S. Atty., for deft., filed.

May 11, 1925, amendment to statement of claim filed.

June 10, 1925, stipulation as to facts and amendments to statement filed.

June 29, 1925, affidavit of defense filed.

June 27, 1925, motion and order to strike statement filed and entered in the argument list.

July 2, 1925, order extending return day of rule to strike statement filed and entered.

2 Sept. 11, 1925, order extending return day of rule to strike statement filed and entered.

Sept. 30, 1925, order extending return day of rule to strike statement filed and entered.

Oct. 27, 1925, order extending return day of rule to strike statement to the date of the argument to be had of the questions of law raised by the affidavit of defense filed and entered.

Dec. 7, 1925, trial without a jury; coram; Thomson, J.

Dec. 31, 1925, opinion filed and entered awarding judgment for plaintiff.

March 6, 1926, præcipe for judgment and order filed and entered directing the clerk to enter judgment herein in accordance with said præcipe, as of December 31, 1925.

March 6, 1926, in accordance with præcipe and order of court this day filed and entered, judgment is hereby entered as of December 31, 1925, in favor of the plaintiff and against D. B. Heiner, collector of internal revenue for the twenty-third district of Pennsylvania, defendant, in the sum of four hundred eleven thousand one hundred twenty-seven and 07/100 ($411,127.07) dollars, with interest from December 31, 1925, and costs of suit.

J. Wood Clark, *Clerk.*

3 March 23, 1926, on petition, order made allowing writ of error as prayed for.

March 23, 1926, assignments of error filed.

April 6, 1926, citation awarded, issued, and service accepted by Sterrett & Acheson, Attys. for appellee.

April 6, 1926, writ of error issued and copy lodged in clerk's office.

April 8, 1926, stipulation for printing record filed.

In United States District Court

Statement of claim

The plaintiff, the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, claims of the defendant, D. B. Heiner, the sums of money hereinafter set forth, upon a cause of action whereof the following is a statement:

I

1. Plaintiff, the Colonial Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal office in the city of Pittsburgh, county of Allegheny, and western district of said State of Pennsylvania, and one of the powers conferred upon the plaintiff by the laws of said State and by virtue of its charter is the power to act as executor of the wills and as administrator of the estates of deceased persons.

4 2. Glenn T. Braden, above named, was at all of the times herein mentioned prior to his death a citizen and resident of the borough of Sewickley, in said Allegheny County, Pennsylvania, died testate in said borough, district, and State on the 23rd day of September, 1923, and by his last will, after his death duly probated and of record in the register's office in said Allegheny County in Will Book, vol. 182, page 539, he appointed plaintiff, the said The Colonial Trust Company, as executor of said will, and the plaintiff duly qualified as such and is the duly appointed and acting executor of the will of the said Glenn T. Braden, deceased.

3. The defendant, D. B. Heiner, is the duly appointed, qualified, and acting collector of internal revenue for the twenty-third district of said State of Pennsylvania, and has been so continuously during the time herein mentioned since August 1, 1921, which district includes the said borough of Sewickley, where the said Glenn T. Braden resided and filed his income-tax returns, and where he and his said executor paid the taxes assessed, as hereinafter set forth.

II

4. For a valuable consideration and as a result of treaty negotiations and the issuance of proper patents the Osage Tribe of Indians

acquired title to all of the lands now embraced in what is known as Osage County, Oklahoma. Reference is here made to a special act of Congress, approved June 5, 1872 (17 Stat. 228), as follows:

5 "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to provide said Osage Tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the Creek country and the main channel of the Arkansas River, and on the north by the south line of the State of Kansas: Provided, That the location as aforesaid shall be made under the provisions of Article Sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: And provided further, That said Great and Little Osage Tribe of Indians shall permit the settlement within the limits of said tract of land (of) the Kansas Tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas Tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians.

"Approved June 5, 1872."

Also to another special act of Congress approved March 3, 1873 (17 Stat. 538), as follows:

6 "Indian Bureau.—That the Secretary of the Treasury is hereby authorized and directed to transfer from the proceeds of sale of the Osage Indian lands in Kansas, made in accordance with the twelfth section of the act of Congress approved July fifteenth, eighteen hundred and seventy, the sum of one million six hundred and fifty thousand six hundred dollars, or so much thereof as may be necessary to pay for lands purchased by the Osages from the Cherokees, and to place the same on the books of his department to the credit of the Cherokee Indians, the same shall bear interest at the rate of five per cent, in accordance with the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled 'An act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory,' and the acts of Congress and treaties therein mentioned and referred to, whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior."

5. The said Osage Tribe of Indians have at all times been and now are wards of the National Government; the relation of the United States as guardian of said Osage Tribe of Indians rests upon treaty obligations, acts of Congress, and policies adopted by the Government in dealing with the tribe, and said tribe has at all

times been and is now considered by the United States as a dependent people in the sense that they are subject to the paramount authority of the National Government; from time immemorial all tribal funds and property of the said tribe of Indians have been and now are held in trust by the United States of America, and said funds and properties have at all times been and now are inalienable in any form and are subject to no form of incumbrance or tax; the United States of America has assumed and is continuing to assume the burden, obligation, and duty of protecting the property of the said tribe against all forms of alienation and incumbrance; the United States, while empowered to administer the estate so committed to its care, is and has at all times been powerless to subject same to the payment of taxes or to any form of alienation or incumbrance; neither has the United States attempted to subject said trust estate to the payment of any form of tax.

7

III

6. By the Osage allotment act of June 28th, 1906 (34 Stat. 539), which is also a special act, the United States authorized the allotment of the lands in the Osage Nation to the members thereof in severalty, but specifically reserved by said act the right to develop for said Indians all of the lands embraced in what is known as the Osage Nation, of which the hereinafter mentioned lease owned by said Glenn T. Braden was and is a part, for oil and gas and other mineral purposes, as shown by the following provision of said act:

"Provided, That the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allot'ee, unless otherwise provided by Congress: And provided further, That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: And provided further, That the oil, gas, coal, and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by act of Congress."

8

"Sec. 3. That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals covered by selections and division of land herein provided for, may be made by the Osage Tribe of Indians through its tribal council, with the approval of Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That

no mining of or prospecting for any of said minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract."

9 "Sec. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided."

7. The reservation thus contained in said act of June 28, 1906, was further extended by a further special act of Congress, approved March 3rd, 1921, as follows:

"Act Approved March 3, 1921

"An act to amend section 3 of the act of Congress of June 28, 1906, entitled 'An act of the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes.'

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all that part of the act of June 28, 1906 (Thirty-fourth Statutes at Large, page 539), entitled 'An act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' which reserves to the Osage Tribe the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is made in that act is hereby amended so that the oil, gas, coal, or other

10 minerals covered by said lands are reserved to the Osage Tribe for the period ending April 7, 1946: Provided, That all valid existing oil and gas leases on the 7th day of April, 1931, are hereby renewed upon the same terms and extended, subject to all other conditions and provisions thereof, until the 8th day of April, 1946, and as long thereafter as oil or gas is found in paying quantities, and the Secretary of the Interior and the Osage council are hereby authorized and directed to offer for lease for oil and gas purposes all of the remaining portion of the unleased Osage land prior to April 8, 1931, offering the same annually at the rate of not less than one-tenth of the unleased area."

Under the above acts the date of the expiration of the trusteeship of the United States over the oil, gas, and other mineral deposits of said Osage Nation or Tribe of Indians will not expire before April 7th, 1946.

IV

8. Having assumed the obligation and duty of developing the lands of the Osage Nation or Tribe of Indians for oil, gas, and other mineral deposits, the United States has, through the Department of the Interior, leased large portions thereof to individual oil operators

and oil companies; that among others acquiring an interest in said Osage Nation or Tribe of Indians' lands, as oil lessee, by approval of the Secretary of the Interior, was Glenn T. Braden, who, prior to the year 1917, acquired an undivided three-fourths (¾) interest in the

11 North half (N/2) of section 12, township 20 north, range 8 east, in Osage County, Oklahoma.

9. The said Glenn T. Braden, in compliance with the terms of said lease and the rules and regulations of the Department of the Interior, drilled a number of oil wells thereon and produced large quantities of oil therefrom.

V

10. He, the said Glenn T. Braden, agreed to pay as a royalty on the oil produced from said lease sixteen and two-thirds per cent (16⅔%) of the gross proceeds from the sale of the oil produced thereon from wells producing one hundred (100) barrels or less and twenty per cent (20%) as a royalty for all oil produced from wells producing more than one hundred (100) barrels per day. That in addition thereto certain other obligations were assumed by the said Glenn T. Braden not assumed by any lessee under any other form of lease in use in the Mid-Continent oil and gas fields; that said royalty is greatly in excess of the royalty usually paid by a lessee under the terms of what is known as commercial leases.

In the said transaction of lease between the said Glenn T. Braden and his said lessors it was not contemplated on either side that the lessee's income from his sale of his share of the oil produced by him from said Indian lands would be taxable by the United States

12 or by any taxing authority, and a correct summary of the main terms of the said lease to the said Glenn T. Braden, as lessee, and the terms of the commercial lease at the time and afterwards in universal use, including said oil territory, is as follows:

GLENN T. BRADEN, OSAGE LEASE	PRODUCERS, 88
Expires 1931.	Perpetual.
Grants only oil rights.	Grants oil and gas rights.
High bonus.	Low bonus.
Royalty on wells producing 100 barrels or less, 16⅔ per cent; over 100 barrels, 20 per cent.	Royalty: Maximum, 12½ per cent.
If lessor elects to take oil, storage shall be provided for 30 days.	Lessor cannot elect.
Government has right to purchase oil produced at posted price.	Lessor has no option to purchase. Oil brings premium.
Secretary may suspend drilling. (This was done recently.)	Lessor cannot suspend drilling.
Lessee pays $100.00 for each location on cultivated lands.	No such requirements.

GLENN T. BRADEN, OSAGE LEASE	PRODUCERS, 88
13 Buildings and permanent improvements in certain cases go with land and can not be removed.	Lessee may remove all improvements.
Gas lessees may drill.	Gas goes with oil rights.
Cannot drill through gas sand without consent of inspector.	No restriction on drilling through gas sand.
Casinghead gas manufactured into gasoline provides 16⅔ per cent royalty.	Maximum royalty 12½ per cent.
Subject to present and future regulations of Interior Department.	Interior Department has no control.
Violation of any of the terms of the lease subjects lessee to a fine of $500 per day for every day terms or regulations are violated.	No penalty provided.
Bond required.	No bond required.
Assignment not valid unless approved.	Assignable at will.

11. The said Glenn T. Braden was induced to pay said ex-
14 cessive royalty and to assume the additional burdens and obligations imposed upon him by the terms of said lease in and because of the belief and understanding on his part that the income derived from said lease could not and would not be burdened with any form of governmental tax; in the operation of said lease the said Glenn T. Braden acted as agent or instrument of the Government and was entitled to all of the rights, privileges, and immunities to which the Osage Tribe of Indians were and are entitled, including the right to enjoy the proceeds from the production of oil from said lease without the imposition of an income tax or a governmental tax in any form; and for the United States to lay, or undertake to lay, a tax or assert the power to tax the income of its own lessee from his sale of his share of such oil produced by him from said lands would be to lay a tax upon the Indians in respect of their said lands.

VI

12. As shown by the above quoted provisions of the act of June 28th, 1906, the oil, gas, coal, and other minerals underlying all lands in the Osage Nation were reserved to the use of the tribe or nation for a period of twenty-five years, and as shown by the above quoted provisions of the act of March 3, 1921, this reservation was continued until the 7th day of April, 1946; by said acts of Congress all leases for oil, gas, coal, and other minerals underlying any of the lands in the Osage Nation, including the land covered by the lease from which the income of the said Glenn T. Braden was derived, could
15 only be leased by the Osage Tribe of Indians through its tribal council and with the approval of the Secretary of the Interior,

and under such rules and regulations as he should prescribe; and said Osage lease hereinbefore described was thus made so that the royalties to be paid to said tribe or nation for the oil produced from said lease were and are required to be paid into the Treasury of the United States to be paid out in the manner prescribed by law and in accordance with the rules and regulations of the Department of the Interior.

13. The United States has, by virtue of the relation hereinbefore set out, exercised absolute and complete dominion and control as guardian over the said Osage Nation, and particularly the oil deposits underlying all lands in said nation, including the land hereinabove described, and is holding the same in trust for the use and benefit of said Indians.

14. Under the Constitution and laws of the United States the said Osage Tribe of Indians are under the sole and exclusive jurisdiction of the United States of America; under said Constitution, laws, and treaties the United States of America has assumed the obligation, and it became and is its duty to properly administer said trust and protect the lands of said tribe against any and all forms of alienation and incumbrance, including any taxation thereof; it obligated itself and it became and is its duty to develop the oil deposits underlying said lands for the use and benefit of its wards, the members of said tribe; the said Glenn T. Braden was, during all of the years
16 from 1917 to 1921, inclusive, operating and developing the oil lease covering the tract of land hereinabove described, as the agent or instrumentality of the Government of the United States and as agent or instrumentality of said tribe or nation of Indians, the members or citizens thereof, and as a means employed by the Congress of the United States, acting through the Secretary of the Interior, to carry into effect the powers conferred by, as well as the mandates of the Constitution of the United States, and the various treaties and acts of Congress; and acting in said capacity, the said Glenn T. Braden was, during all of said years, exercising the privileges, licenses, and franchises to him so granted by said United States as such agent, instrumentality, and means.

15. Any tax imposed upon the income derived from said lease developed and operated by the said Glenn T. Braden, pursuant to the acts of Congress aforesaid, and under the direction, control, and dominion of the United States, is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States and the obligation resting upon it by the various treaties with the Osage Tribe of Indians, and is a tax upon a privilege or occupation and exacted from an instrumentality of the United States, and is a tax upon a license or franchise granted by the said United States and exercised by said taxpayer under and by virtue of the Constitution and laws of the United States, and is a tax upon an
17 agent of the United States and his occupation as such, and is a tax upon the income from property which is exempt by

reason of the Constitution and laws of the United States and the various treaties with said tribe of Indians, and is a tax substantially and in effect upon the lease and property from which said income is derived, and upon the powers and operations of the Government of the United States, and a tax upon the property held in trust by the United States for its said Indian wards, and would be and is destructive of the power of the Government to make suitable and proper contracts for the development of the oil deposits belonging to its Indian wards, and would be, and is adding burdens additional to those set out in the contract made to and with the said Glenn T. Braden under governmental supervision, prior to the attempted imposition of such tax, and would be and is destroying the very governmental agency through which the United States is performing its duty and carrying out its contractual obligation to and with its said wards.

VII

16. Upon the threat of the defendant to enforce the payment of such tax, together with penalties and interest as provided by law, by destraint and sale of property, and solely to avoid the imposition of penalties and interest, and under compulsion, duress, and coercion, the said Glenn T. Braden and the plaintiff paid to the defendant, as such collector for the years 1917 to 1920, inclusive, taxes upon income received from said Glenn T. Braden's sale of his share of the oil produced by him as such lessee from said restricted
18 Indian lease; a detailed statement of which is hereinafter more fully pleaded, and all of which taxes were illegally and wrongfully exacted and collected and received by the defendant.

VIII

17. Pursuant to the provisions of an act of Congress, entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3rd, 1917, Glenn T. Braden executed and filed with the collector of internal revenue for the twenty-third district of Pennsylvania his income-tax return for the taxable year of 1917; said return so filed with the collector is, by reference thereto, made a part hereof as fully as though copied in full herein; and there was so received by him during said year and reported in his said income-tax return the sum of $116,412.52, which was received from the sale of oil produced from the land hereinabove described.

By the inclusion of said income derived from the operation of said restricted Osage Indian lease the tax liability of the said Glenn T. Braden was increased by the sum of $62,862.76; the said sum was levied and assessed against the said Glenn T. Braden over his due objection and was paid by the plaintiff under due protest on the 17th day of May, 1924; and having paid said sum under protest and having objected to the assessment being made upon the ground that

same was an illegal tax, for in that it represented a tax upon income derived from the operation of restricted Osage Indian
19 leases, plaintiff thereafter, and on the 4th day of June, 1924, filed with the defendant herein, at his office in the city of Pittsburgh, State of Pennsylvania, its duly signed and sworn to claim for refund of said sum of $62,862.76; a copy of which claim for refund (without the signature) is hereto attached, marked Exhibit "A" and made a part hereof.

18. In the manner above set forth there was assessed (over and beyond a tax paid to a prior collector) against this plaintiff for the taxable year 1918 an additional tax of $20,574.05; said tax was paid under due protest on the 17th day of May, 1924; thereafter and on the 4th day of June, 1924, the plaintiff filed with the defendant, at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for refund of the sum of $20,304.05, being that portion of the additional tax so assessed for the year 1918 which was paid upon income derived from restricted Osage tribal lands; a copy of which claim for refund (without the signatures) is hereto attached, marked Exhibit "B" and made a part hereof.

19. Pursuant to the provisions of an act of Congress entitled "An act to provide revenue, and for other purposes," approved February 24th, 1919, the said Glenn T. Braden filed his income-tax return for the taxable year of 1919 with the collector of internal revenue at Pittsburgh, Pennsylvania, and tendered and paid to said collector of internal revenue the sum of $203,124.09, representing the income derived by him from all sources for the year 1919; at the time
20 of paying said original tax the Treasury Department was laboring under the mistaken belief and was requiring, as a result of its erroneous construction of the laws applicable, that income derived from restricted Indian lands be included in the return, and as a result of such arbitrary and erroneous rulings a tax thereupon was required to be paid; and acting and relying upon said arbitrary and erroneous rulings the said Glenn T. Braden included in said return all income derived by him from the oil lease hereinabove described.

Subsequent to the assessment and payment (to a former collector) of said sum of $203,124.09, there was levied and assessed against the said Glenn T. Braden, over the due protest of the plaintiff, the further sum of $92,093.75 for the said year 1919, which additional assessment was paid under due protest on May 29, 1924; and of said total sum of $295,217.84 levied, assessed, and collected for the year 1919 the sum of $220,650.76, including said $92,093.75 paid the defendant, represented the tax so illegally levied, assessed, and collected, for the reason that same was levied, assessed, and collected upon income derived from said restricted Indian lease.

After the payment of said tax, and on the 4th day of June, 1924, the plaintiff filed with the defendant herein, at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for a refund of said

taxes so illegally levied, assessed, and collected in the sum of $220,650.76, a copy of which claim for refund (without signatures) is hereto attached, marked Exhibit "C" and made a part hereof.

21 20. Pursuant to the provisions of an act of Congress entitled "An act to provide revenue, and for other purposes," approved February 24th, 1919, the said Glenn T. Braden filed his income-tax return for the taxable year of 1920 with the collector of internal revenue at Pittsburgh, Pennsylvania, and tendered and paid to the collectors of internal revenue the sum of $312,762.51, representing the income derived by him from all sources for the year 1920; at the time of paying said original tax the Treasury Department was laboring under the mistaken belief and was requiring, as a result of its erroneous construction of the laws applicable, that income derived from restricted Indian lands be included in the return and a tax thereupon was required to be paid; and acting and relying upon said arbitrary and erroneous rulings the said Glenn T. Braden included in said return all income derived by him from the oil lease hereinabove described.

Subsequent to the assessment and paying of said sum of $312,762.51 there was levied and assessed against the said Glenn T. Braden, over the due protest of the plaintiff, the further sum of $20,659.86 for the said year of 1920, which additional assessment was paid under protest on May 29th, 1924; and of said total sum of $333,422.37 levied, assessed, and collected for the year 1920 the sum of $331,164.23 represented the tax so illegally levied, assessed, and collected for the reasons that same was levied, assessed, and collected upon income derived from said restricted Indian lease, whereof there was paid as aforesaid by the said Glenn T. Braden to

22 the defendant $156,381.25 (half on September 12, 1921, and half on December 17, 1921), and by plaintiff to the defendant $20,659.86.

After the payment of said tax and on the 4th day of June, 1924, the plaintiff filed with the defendant herein at Pittsburgh, Pennsylvania, its duly signed and sworn to claim for a refund of said taxes so illegally levied, assessed, and collected in the sum of $331,164.23, a copy of which claim for refund (without signatures) is hereto attached, marked Exhibit "D," and made a part hereof.

21. Said protests were in writing and accompanied the aforesaid payments and embodied written notice to the defendant of the intention to bring a suit against the defendant to test the validity of his said claims for said taxes so exacted, collected, and paid as aforesaid.

22. Said claims for refund have all been denied by the Commissioner of Internal Revenue, because, according to the commissioner, there appeared to him to be no basis under the income tax laws for holding the income in question as nontaxable, and no part of said taxes has been refunded, and plaintiff, having complied with all of the provisions of the acts of Congress and the rules and regulations of the Treasury Department as to objections, protests, appeals, and claims for refund, has not been able to recover any part of said

taxes so illegally levied, assessed, exacted, and collected, and is therefore without any recourse except to pursue the remedy given to taxpayers under and by virtue of the acts of Congress, which gives this plaintiff the right to proceed in this court for the
23 recovery of said taxes so wrongfully and illegally levied, assessed, exacted, and collected, which taxes are wholly due and owing to the plaintiff from the defendant, to wit, as follows:

The full sum of $62,862.76 with interest thereon from May 17, 1924.

The full sum of $20,304.05 with interest thereon from May 17, 1924.

The full sum of $92,093.75 with interest thereon from May 29, 1924.

The full sum of $156,381.25 with interest on $78,190.63 from September 12, 1921, and on $78,190.62 from December 17, 1921.

The full sum of $20,659.86 with interest thereon from May 29, 1924.

Wherefore plaintiff brings this action.

ALLEN & UNDERWOOD.
STERRETT & ACHESON,
Attorneys for Plaintiff.

[*Duly sworn to by John W. Chalfant. Jurat omitted in printing.*]

24 In United States District Court

Note re exhibits

(Attached to statement of claim are four exhibits, identified as A, B, C, and D, which are in due form and duly support the allegations with respect to said exhibits in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibits are not printed.)

In United States District Court

Amendment to statement of claim

Agreeably to the rule of court, the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, the plaintiff hereby amends and supplements its statement of claim as follows:

25 By changing Subdivision VII, 16, by substituting "1921" for "1920" where the latter appears in said subdivision.

By adding a paragraph numbered 20½ after paragraph 20 and before paragraph 21, as follows:

20½. Pursuant to the provisions of an act of Congress entitled "An act to reduce and equalize taxation, to provide revenue, and for other purposes," approved November 23, 1921, the said Glenn T. Braden

filed his income-tax return for the taxable year of 1921 with the defendant herein. In making said return the said Glenn T. Braden, pursuant to the requirements of the rules, regulations, and decisions of the Treasury Department and in ignorance of his legal rights in the premises, included in his return of income all sums received by him from said oil lease and paid to the defendant a tax upon the same, which amounted to the sum of $689.85, which income would not have been included in said return but for the erroneous construction of the laws as applied by the Treasury Department and the demand by said department that said income be included in the income-tax returns of all individuals operating leases in the Osage Nation.

After said payment of said tax and on the 4th day of June, 1924, the plaintiff filed with the defendant herein at Pittsburgh, Pennsylvania, its duly signed and sworn-to claim for a refund of said tax so illegally collected in said sum of $689.85, a copy of which claim for refund (without the signatures) is hereto attached, marked Exhibit "E" and made a part hereof.

26 By adding to the final paragraph of the statement of claim the claim as wholly due and owing to the plaintiff from the defendant of the full sum of $689.85 with interest thereon from March 15, 1922.

The foregoing averments are made with the same force and effect as if contained as above and at the above places in the statement of claim as originally filed.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff.

[*Duly sworn to by John W. Chalfant. Jurat omitted in printing.*]

27 In United States District Court

Note re exhibit

(Attached to amended statement of claim is Exhibit E, which is in due form and duly supports the allegation with respect to said exhibit in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibit is not printed.)

In United States District Court

Affidavit of defense

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

D. B. Heiner, collector of internal revenue for the twenty-third district of Pennsylvania, defendant above named, being duly sworn according to law, deposes and says that he is fully acquainted with

the facts herein set forth, and that he is advised and so avers that the statement of claim filed by the plaintiff in the above entitled case is insufficient in law for the following reasons:

1. That it does not aver facts sufficient to constitute a cause of action.

2. That the income which was the subject of the tax sought to be recovered in this suit was not exempt from said tax under the provisions of the revenue acts of 1916, 1917, 1918, and 1921.

3. That the income which was the subject of the tax sought
28 to be recovered in this suit was not exempt from said tax by reason of any provisions of law, treaty, or governmental policy relating to the Osage Tribe of Indians, or because of any relationship, duty, obligation, or right arising out of the guardianship of the United States over the funds and property of the Osage Tribe of Indians.

4. That the alleged fact that the mineral lands belonging to the Osage Tribe of Indians described in the statement of claim were restricted as to alienation in the hands of said tribe and were subject to the supervision and control of the United States under acts of Congress, treaties with the said Osage Tribe, and governmental policies relating thereto did not, as a matter of law, make the income derived by Glenn T. Braden from the sale of oil and gas produced therefrom and owned by him exempt from the tax collected on such income and here sought to be recovered.

5. That the income which was the subject of the tax sought to be recovered in this suit was not exempt from said tax by reason of the existence of any right to such exemption in the said Glenn T. Braden, the recipient thereof, accruing to him by virtue of his status as lessee under the oil and gas lease described in the statement of claim and in the amendment thereto (stipulation paragraph 3), nor was such income exempt from said tax because of any rights, privileges, duties, or obligations accruing to or assumed by the said Glenn T. Braden as such lessee, nor was such income exempt because of the existence of any peculiar relationship between the said
29 Glenn T. Braden and the United States or the Osage Tribe of Indians arising out of said lease or the laws, treaties, rules, and regulations applicable thereto, and assumed by the said Glenn T. Braden thereunder.

Defendant, therefore, respectfully requests the court to hear and dispose of the questions of law so raised in accordance with the provisions of section 20 of the practice act of 1915.

D. B. HEINER.

Sworn to and subscribed before me this 27th day of June, A. D. 1925.

[SEAL.]

GERTRUDE HORTON,
Dep. Clerk, U. S. Dist. A.

In United States District Court

Defendant's motion to strike

And now, on this 27th day of June, 1925, D. B. Heiner, the above-named defendant, by Walter Lyon, United States Attorney for the Western District of Pennsylvania, moves the court to grant a rule on the Colonial Trust Company, executor of the will of Glenn T. Braden, deceased, plaintiff, to show cause why the statement of claim in the above-entitled case should not be stricken off, and in support of said motion assigns the following reasons:

1. That paragraph 10 of said statement of claim, beginning with the words "that in addition thereto certain other obligations were assumed by the said Glenn T. Braden," etc., down to the end of said paragraph 10, avers alleged facts which are wholly immaterial to any issues in this case.

30 2. That paragraph 11 of said statement of claim as interpreted by paragraph 4 of the stipulation herein filed avers alleged facts which are wholly immaterial, are deductions and inferences of the pleader, and also makes averments which are conclusions and inferences of law.

3. That paragraph 14 of the said statement of claim consists entirely of conclusions and inferences of law and is argumentative.

4. That paragraph 15 of said statement of claim consists entirely of conclusions and inferences of law and is argumentative.

WALTER LYON,
Per W. P. M.,
United States Attorney.

In United States District Court

Agreement re motions to strike

December 7, 1925, it is agreed that in so far as the court may conclude that the motions to strike out are well founded, the portions of the statements of claim so adjudged validly basis for the motions shall thereby be deemed automatically to have been amended out of the statements of claim respectively.

STERRETT & ACHESON,
ALLEN & UNDERWOOD,
Attorneys for Plaintiffs.
W. J. AIKEN,
Attorney for Defendants.

31 In United States District Court

Stipulation re amendments, etc.

The plaintiff and the defendant, recognizing that the facts in the above case are not in dispute and that the fundamental questions are of law, in order to facilitate the due presentation of those questions to the court, hereby mutually stipulate of record as follows:

1. Paragraph 5 of the plaintiff's statement of claim is and shall be treated as amended by striking out the words "or tax" in the fourth line of page 4 and by striking out the portion of said paragraph commencing "the United States, while empowered to administer the estate," etc., to the end of the paragraph.

2. Paragraph 6 of the statement of claim shall be amended so that the portion thereof before the quotation of the act of Congress therein mentioned shall read as follows:

"The Osage allotment act of June 28, 1906 (34 Stat. 539), which is also a special act, authorized the allotment of the lands in the Osage Nation to the members thereof in severalty, but specifically reserved from allotment all of the oil, gas, and other minerals underlying the lands embraced in what is known as the Osage Nation, of which the hereinafter-mentioned lease, owned by said Glenn T. Braden, was and is a part, as shown by the following provision of said act."

3. Paragraph 8 is and shall be regarded as amended to read as follows:

"Pursuant to said acts of Congress and the rules and regu-
32 lations of the Department of the Interior promulgated there-
under, large portions of the Osage Nation mineral lands have been leased to individual oil operators and oil companies; among other acquiring an interest in said Osage Nation or Tribe of Indians' lands, as oil lessee, by approval of the Secretary of the Interior, was Glenn T. Braden, who prior to the year 1917 acquired an undivided three-fourths (¾) interest in the north half (N/2) of section 12, township 20 north, range 8 east, in Osage County, Oklahoma, a copy of which rules and regulations, containing the form of lease identical with the said lease owned and held by Glenn T. Braden, is hereto attached and marked "Exhibit 1" and hereby made a part hereof.

4. It is not averred or meant to be averred in the 10th and 11th paragraphs of the plaintiff's statement of claim that any agreement was made or inducement offered to the said Glenn T. Braden to enter into said lease or that the matter of the taxability of his income therefrom was in any wise mentioned or discussed, but that the use of these and like terms contained in these two paragraphs are deductions of the pleader drawn solely from the language of the terms of the lease, acts of Congress, and rules and regulations of the Department of the Interior set forth in the statement of claim and in the exhibits attached hereto.

The defendant contends that the matters set up in said paragraphs, in so far as matters of fact, are immaterial.

33 The defendant further contends that the balance of said two paragraphs are matters of law, which are denied by the defendant.

It is agreed that the defendant's said objections to the entire paragraphs 10 and 11 shall amount to a motion to strike said paragraphs from the statement of claim, the defendant reserving the right to file a more formal motion with further reasons.

5. Paragraph 12 of the statement of claim is, and shall be, regarded as amended by changing the words "so that" in the 6th line from the end of the paragraph to read "and."

6. Paragraph 13 of the statement of claim is, and shall be, regarded as amended by adding thereto the following: "Except that oil, gas, and mineral leases made pursuant to said acts of Congress are required to be executed by the tribal council, but have no validity and are inoperative unless and until approved by the Secretary of the Interior."

7. Paragraphs 14 and 15 embrace contentions made herein by the plaintiff and are matters of law which the defendant denies, the defendant reserving the right to file a formal motion to strike out the same, with supporting reasons.

8. It is stipulated that the averments of fact contained in paragraphs 1, 2, and 3 of plaintiff's statement of claim are true, and that the averments of paragraphs 16 to 21, inclusive, and of paragraph 20½ of plaintiff's amendment to statement of claim filed

34 herein on May 11, 1925, in so far as they state facts relating to the filing of returns by Glenn T. Braden with the defendant collector of internal revenue at Pittsburgh, Pennsylvania, the payment by Glenn T. Braden of taxes shown to be due by such returns, the assessment, collection, payment by Glenn T. Braden, and the receipt by the defendant of such taxes and of additional taxes levied or assessed by the Commissioner of Internal Revenue, payment under protest, the filing of claims for refund, the execution of waivers, and the denial or rejection of such claims for refund are true. All averments contained in said paragraphs 16 to 21, inclusive, which are to the effect that the taxes assessed and collected and sought to be recovered in this suit were illegally, wrongfully, or erroneously assessed, levied, and collected, and all averments to the effect that the rulings of the Secretary of the Treasury or the Commissioner of Internal Revenue requiring such taxes to be paid were erroneous, illegal, mistaken, arbitrary, or otherwise unlawful, are denied by the defendant. The defendant admits that no part of the tax sought to be recovered has been refunded to the plaintiff, but denies that the sums alleged to be due the plaintiff in paragraph 21 of plaintiff's statement of claim and in paragraph 20½ of said amendment

thereto, or any other sum, is due and owing to the plaintiff from the defendant.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff.
WALTER LYON,
Attorney for Defendant.

35 *Exhibit 1 to stipulation*

Regulations to govern the leasing of lands in the Osage Reservation, Okla., for oil and gas mining purposes. Approved August 26, 1915

Section 3 of the act approved June 28, 1906 (34 Stat. L. 539–543), provides:

That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selection and division of land herein provided for, may be made by the Osage Tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided
36 for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract.

To carry this provision of law into effect, the following forms and regulations are prescribed to govern the leasing of such lands for oil and gas mining:

DEFINITIONS

The following expressions wherever used in the lease and regulations shall have the meaning now designated, viz:

Superintendent: The superintendent of the Osage Agency, Pawhuska, Okla., in charge of the Osage Agency and Reservation, or any other person who may be in charge of such agency and reservation, and it shall be his duty to enforce compliance with these regulations.

Inspector: Any person appointed as inspector of oil and gas wells, or who may be designated by the Secretary of the Interior or the Commissioner of Indian Affairs to supervise oil or gas operations on Osage lands under the direction of the superintendent.

Foster lease: That contract made on March 16, 1896, between the Osage Tribe of Indians and Edwin B. Foster, and extended by the act of March 3, 1905 (33 Stat. L. 1061), as to approximately 680,000 acres.

Sublessee: Any person, firm, or corporation which has any leasehold interest in Osage oil and gas lands acquired under the Foster lease.

37 Sublease: Any land or any leasehold interest in any land acquired under the Foster lease.

Oil lessee: Any person, firm, or corporation to whom an oil mining lease is made under these regulations.

Gas lessee: Any person, firm, or corporation to whom a gas lease is made under these regulations.

Arbitration: Each of the parties to the controversy, dispute, or matter to be adjusted shall designate one representative, and the representatives so designated shall immediately together appoint a third person, and on failure to agree, within five days upon a third person, the superintendent may designate same. These three shall constitute a board of arbitration, and the action of such board shall be final and conclusive between the parties. The expense of arbitration in any case shall be divided between the parties in interest in equal proportions.

Casing-head gas: The gas coming through the casing when the well is equipped for pumping oil.

SPECIFIC PROVISIONS RELATING TO NEW LEASES OF LANDS COVERED BY THE FOSTER LEASE

1. Each and every person, firm, partnership, joint-stock association, corporation, and each and every combination of person
38 and corporation, partnership and corporation, or corporation and corporation holding subleases and assignments under the Foster lease approved by the Secretary of the Interior, shall be considered and treated as a distinct and separate entity independent of his or their affiliations with any other sublessee. No assignment or sublease made subsequent to July 1, 1915, will be approved.

2. Any such sublessee who in good faith shall have made an effort prior to October 1, 1915, to develop any lands under the Foster lease for oil, and shall have drilled one or more wells thereon, even though such wells may have resulted in dry holes, will be granted a new oil lease on the expiration of the Foster lease on March 16, 1916, under the conditions set forth in sections 3 to 9 of these regulations, provided acceptance of the resolution of the tribal council dated June 17, 1915, is filed with the superintendent not later than September 1, 1915.

3. Any such sublessee may select from his present holdings and obtain an oil lease embracing not to exceed 4,800 acres of land in quarter-section units according to the public survey, or in fractional parts of such units where the present sublease does not cover a full

quarter section, except such quarter section or fractional quarter-section units the producing wells of which were capable of averaging 25 or more barrels of oil per day on July 1, 1915, which units shall be released to the Osage Tribe on March 16, 1916, together with all other producing and nonproducing properties held by each such sublessee in excess of 4,800 acres.

39 4. All units on which there are producing oil wells released to the Osage Tribe shall be offered for lease to the highest bidder at public auction not later than February 15, 1916, the purchaser to take possession on March 17, 1916. Any sublessee releasing producing units to the tribe shall be permitted to bid for such units at the sale, and any such properties acquired shall not be considered a part of his 4,800 acres. The terms, conditions, and rules under which the public sale shall be conducted shall be stated in the advertisements.

5. Should a sublessee, in expectation of becoming a purchaser at the public auction, not have selected from his present holdings the full area of oil lands on which he might be granted a lease under section 3 hereof, and it develops that such sublessee is unable to acquire the units which he had expected to purchase at the public sale, he may on or before March 1, 1916, select other lands within his sublease, so as to obtain the full benefits of section 3 of these regulations: Provided, That the sublessee, at the time he submits the plat of lands on which he seeks to acquire a new lease as provided in section 9, shall give notice of his intention to take advantage of the benefits of this section.

6. An appraisement shall be made under the direction of the Secretary of the Interior of each quarter section and fractional quarter section unit the producing wells of which were capable of averaging 25 or more barrels per day on July 1, 1915, to be released to the Osage Tribe, together with the equipment on

40 all producing units released to the tribe, including the casings in the wells. Should the sublessee be unwilling to accept the appraisement of the equipment as made he shall have 30 days after March 16, 1916, within which to remove any engines, derricks, tools, and machinery, but in no case shall the casings in any producing wells be removed, and the value of such casings shall be determined by arbitration and the sublessee shall be reimbursed by the purchaser. The appraised value of the equipment shall be published and no bid will be accepted less than such appraisement. The successful bidder shall pay the sublessee for the equipment, and the bonus for the land shall be paid to the superintendent.

7. In the event that no acceptable offer is received at the public sale for any producing oil unit, the sublessee shall be permitted to continue the development and operation of such unit and to have a lease on the same, and such acreage shall not be considered as a part of the 4,800 acres which he is entitled to hold under these regulations.

8. Gas leases shall be made by the tribal council to the present gas lessees covering all or part of their present holdings and for such periods as the Secretary of the Interior may determine: Provided, That applications made prior to June 17, 1915, for leases of gas may be granted in the discretion of the Secretary of the Interior.

9. Each oil and gas sublessee shall furnish the superintend-
41 ent on or before November 1, 1915, with a plat showing legal subdivisions of the lands upon which he desires a new lease, together with an itemized statement showing first cost and present value of all surface equipment on each producing quarter section or fractional quarter section to be released to the Osage Tribe which he desires to have appraised and sold with the property.

Applicants for gas leases shall file a certified plat indicating the lands desired, showing the location and ownership of gas wells, together with all gas-pipe lines and any other related equipment, with a statement of any indebtedness covering any improvements and equipment within the area applied for.

10. All contracts for the sale of gas for industrial purposes and sworn statements showing terms, conditions, and schedule of prices contained in contracts with domestic consumers shall be subject to the approval of the Secretary of the Interior, and shall be filed with the superintendent, who shall forward them without recommendation to the Secretary of the Interior through the Commissioner of Indian Affairs. Before any such contract or schedule is approved the superintendent shall be notified of the terms upon which the Secretary of the Interior will approve the same, and he will thereupon notify the principal chief, who shall convene the tribal council and inform the members of the terms of the proposed contract.

The tribal council may within 10 days from receipt of such
42 notice by the superintendent communicate to the Secretary of the Interior, through the superintendent and the Commissioner of Indian Affairs, their views with reference to any proposed contract.

In the sale and disposition of gas preference shall at all times be given to domestic consumers. All contracts for the industrial use of gas shall contain a clause to the effect that when it is shown to the satisfaction of the Secretary of the Interior that such gas is needed by domestic consumers within an area fixed by the Secretary of the Interior, such contract shall terminate upon the expiration of 30 days' notice from the Secretary of the Interior, and that the superintendent shall have authority to immediately suspend the furnishing of gas to industrial consumers when he is of opinion that such gas is needed for domestic consumers. All gas furnished to industrial and domestic consumers shall be metered and sold at meter rates: Provided, That gas furnished to an oil lessee may be sold as provided in the gas lessee's contract.

All contracts with domestic consumers shall be subject to the inspection of the superintendent.

(Form B)

OIL MINING LEASE, OSAGE RESERVATION, OKLAHOMA

This lease, made and entered into in quadruplicate on this _____ day of _____, A. D. 19__, by and between the Osage Tribe of Indians in Oklahoma, by _____, principal chief, under authority of the resolution of the Osage tribal council,
43 dated June 17, 1915, party of the first part, designated as lessor, and _____, of _____, party of the second part, designated as lessee, under and in pursuance of section 3 of the act approved June 28, 1906 (34 Stat. L. 539–543), witnesseth:

1. The lessor, in consideration of $1, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions herein contained, and hereby agreed to be paid, observed and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil is found in paying quantities, provided that the term of this lease shall not extend beyond the date the title to the minerals remains in the Osage Tribe, all the oil deposits in or under lands described as follows, to wit:

_____ Sec. _____, T. _____ N., R. _____ E.,
_____ Sec. _____, T. _____ N., R. _____ E.,

of the Indian meridian, and containing _____ acres, more or less, with the exclusive right to extract, pipe, store, and remove oil.

2. The lessee agrees to pay or cause to be paid to the superintendent of the Osage Indian Agency, at Pawhuska, Okla., for the lessor, as royalty, the sum of 16⅔ per cent of the gross proceeds from sales after deducting the oil used for fuel in operating the lease, unless the Osage tribal council, with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, payment to be made at time of sale or removal of the oil, except where payments are made on division orders, and settlement shall
44 be based on the actual selling price, but at not less than the highest posted market price in the Mid-Continent oil field on the day of sale or removal: Provided, That when the quantity of oil taken from all the producing wells on any quarter section according to the public survey, or fractional part of a quarter section if the land covered by this lease does not include the full quarter section, during any calendar month, is sufficient to average 100 or more barrels per well per day, the royalty on such oil shall be 20 per cent.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding 30 days.

Any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the day of sale all or any part of the oil produced under this lease.

3. Lessees shall drill at least one well to the Mississippi lime, unless oil or gas is found in commercial quantities at a lesser depth, on each and every quarter section or fractional quarter section of land covered by this lease which is not producing oil on March 16, 1916, within one year from the date of approval hereof, or shall pay to the superintendent, for the lessor, rental of $1 per acre, payable annually, for each year or fractional part of a year the land is held by the lessee and a well is not drilled: Provided, That the
45 time within which a well shall be drilled or rental paid in lieu of drilling shall not begin to run on any homestead selection until the consent of the Secretary of the Interior to drilling on such homestead shall have been given. Should the lessee elect to surrender any such quarter section or fractional quarter section before the end of any such yearly period without drilling a well thereon, he shall pay the rental of $1 per acre for the fractional part of a year the land is held and a well is not drilled, and failure of the lessee to pay such rental within 25 days from the expiration of any yearly period during which such well is not drilled shall be cause for the cancellation of this lease by the Secretary of the Interior, but such cancellation shall not release the lessee and his sureties from the obligation to pay such rental: Provided, That the lessee may surrender this lease and have the same cancelled at any time as to any homestead selection should the Secretary of the Interior refuse to give his consent to drilling thereon: Provided further, That whenever the Secretary of the Interior shall consider the marketing facilities inadequate to take care of the production he may direct the suspension of drilling operations on all producing lands.

4. Lessee shall have the right to use so much of the surface of the land and such water on the premises as may be necessary for operations, including the right to lay and maintain pipe lines, telephone and telegraph lines, pull rods, and other appliances necessary for the operation of the wells; also the right of ingress and egress and the rights of way to any point of operations under condition
46 of least injury and inconvenience to the owner and occupant of the surface. Before commencing operations the lessee shall pay to the surface owner the sum of $100 for each well located on cultivated land or land suitable for cultivation and $35 for each location on land not susceptible to cultivation. Location sites shall not exceed 1½ acres in area. Lessee shall also pay $10 for each site outside of the well location used for oil tank of not exceeding 1,600 barrels' capacity, allowing 50 feet square for each tank site. The sum to be paid for an oil-tank site of larger capacity and occupying a greater area shall be as agreed upon between the surface owner and the lessee, and on failure to agree the same shall be fixed by arbitration. During operations the lessee shall pay all damages for the use of the surface other than that included in the location and tank sites, all damages to any growing crops or to any improvements on the lands, and all other damages as may be occasioned by reason of

operations. Such damages shall be apportioned among the parties interested in the surface, whether as owner, lessee, or otherwise, as the parties may mutually agree or as their interests may appear. If the parties are unable to agree concerning damages, the same shall be determined by arbitration.

All agreements (or authenticated copies thereof) providing for the settlement of damages shall be filed in the Osage agency if the surface owner is a restricted Indian, and all such amounts which may be due and payable to any such Indian shall be paid to
47 the superintendent and by him immediately remitted to the Indian entitled thereto. All sums due as royalty or damages shall be a lien on all equipment and unsold oil or leased premises.

5. The lessee shall carry on operations in a workmanlike manner, commit no waste, and suffer none to be committed upon the land, nor permit any nuisance to be maintained on the premises under his control, nor allow any intoxicating liquors to be introduced, brought upon, sold, or given away for any purposes on such premises; also keep an accurate account of all operatiions, receipts, and disbursements, furnishing sworn reports of such when and as required by the regulations or by an authorized representative of the Secretary of the Interior.

All buildings and permanent improvements, including casings of all producing wells drilled three years or more prior to the expiration of the lease, shall remain a part of said land and become the property of the surface owner at expiration of the lease, excepting tools, tanks, boiler houses, pipe lines, pumping and drilling outfits, derricks, engines, machinery, and the casings of all dry or nonpaying wells. The casings of wells drilled less than three years prior to and producing oil on the expiration of the lease shall remain the property of the oil lessee: Provided, That such casings shall not be removed from the wells, but shall be purchased from the lessee by the owner of the oil rights at such price as may be mutually agreed upon, and on failure to agree the price shall be fixed by arbitration.

48 6. The lessee accepts this lease with the understanding that the lands covered thereby may be leased to some other party, who shall have the exclusive right to all gas except as herein provided.

7. If the oil lessee shall drill a gas well, he shall, without removing from the well any of the casing or other equipment, immediately shut the well in and notify the gas lessee and the superintendent. In the event the gas lessee does not within 30 days after receiving notice elect to take over such well and reimburse the oil lessee the cost of drilling the same, including all damages paid, in addition to the cost in place of casing, tubing, and other equipment, the oil lessee shall immediately confine the gas to the original stratum, and the disposition of such well shall be subject to the approval of the superintendent.

8. If the gas lessee shall drill an oil well upon the lands described herein, he shall immediately, without removing from the well any of the casing or other equipment, notify the oil lessee and the superintendent. In the event the oil lessee does not within 30 days after receipt of notice elect to take over such well, he shall immediately so notify the gas lessee, and the disposition of such well shall be subject to the approval of the superintendent. Should the oil lessee elect to take over the well, he shall pay the gas lessee the cost of drilling the same, including all damages paid, in addition to the cost in place of casing and other equipment.

9. If the oil lessee shall drill a well which produces both oil
49 and gas in commercial quantities from the same sand, he shall immediately notify the gas lessee, and together they shall arrange for the separation and utilization of the oil and gas and the cost pertaining to said well.

10. Whenever oil and gas are found in separate sands and the oil lessee desires to drill through the gas sand for the oil, he may do so, provided the method of protecting the gas sand shall be approved by the inspector.

11. If at any time any oil or gas well becomes unprofitable and the oil or gas lessee desires to deepen the same, such action as may be mutually agreed upon may be taken not in conflict with the regulations. Upon failure to agree the disposition of such well shall be subject to the approval of the superintendent.

12. All casing-head gas shall belong to the oil lessee, and when used for the manufacture of gasoline shall be metered and be subject to a royalty of 16⅔ per cent, based on the market value of the gasoline contents, and all such gas not utilized by the oil lessee on his leased premises or for operating other adjoining leases within the Osage Reservation shall belong to the gas lessee, subject to the prescribed royalty of 16⅔ per cent.

13. The gas lessee shall furnish the oil lessee, free of royalty, sufficient gas for drilling and operating purposes at a rate to be agreed upon, or on failure to agree the rate shall be fixed by arbitra-
50 tion: Provided, That the oil lessee shall make necessary connections between the well and the meter whenever possible.

14. The oil lessee may at any time by paying to the superintendent all amounts then due, including rentals in lieu of development as provided in paragraph numbered three hereof, and the further sum of $1, surrender all or any quarter section or fractional part of quarter section where the lease does not cover the full quarter section, and have the lease cancelled as to the lands surrendered and be relieved from all further obligations and liabilities thereunder as to the part surrendered: Provided, That if this lease has been recorded lessee shall execute a release and record the same in the proper office.

15. All amounts due and payable under this lease shall be paid to the superintendent in St. Louis or Kansas City exchange, except that, where such exchange can not be procured, post office or express money orders will be accepted.

16. This lease is subject to the regulations now or hereafter prescribed by the Secretary of the Interior relative to such leases, all of which are made a part of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental, or acreage unless agreed to by both parties.

17. Violation of any of the terms or conditions of this lease
51 or of the regulations pertaining thereto shall subject the lease to cancellation by the Secretary of the Interior, or the lessee to a fine of not exceeding $500 per day for each and every day the terms of the lease or of the regulations are violated, or the orders of the superintendent in reference thereto are not complied with, or to both such fine and cancellation in the discretion of the Secretary of the Interior: Provided, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

18. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

19. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior and not otherwise.

20. Each and every clause and covenant of this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

52 In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

---------- [SEAL].

Attest: ----------

Two witnesses to execution by lessor:

P. O. ----------

P. O. ----------

---------- [SEAL].

Attest: ----------

Two witnesses to execution by lessees:

Post office, ----------

Post office, ----------

ACKNOWLEDGMENT OF PRINCIPAL CHIEF

STATE OF _____
County of _____, *ss:*

Before me, _____, on this _____ day of _____, 19__, personally appeared _____, to me known to be the _____ principal chief of the Osage Tribe, and the identical person who executed the within and foregoing lease, and ac-
53 knowledged to me that he executed the same as his voluntary act and deed on behalf of the Osage Tribe and in accordance with the authority given him by the Osage tribal council.

_____,
(*Official title.*)

ACKNOWLEDGMENT OF INDIVIDUAL

STATE OF _____,
County of _____, *ss:*

Before me, a notary public in and for said county and State, on this _____ day of _____, 19__, personally appeared _____, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that _____ executed the same as _____ free and voluntary act and deed for the uses and purposes therein set forth.

_____,
Notary Public.

My commission expires _____.

ACKNOWLEDGMENT OF CORPORATION

STATE OF _____,
County of _____, *ss:*

On this _____ day of _____, A. D. 19__, before me, a _____ within and for the State and county aforesaid,
54 personally appeared _____ and _____ to me personally known, who, beiing by me duly sworn, did each say that _____ is the president and _____ is the _____ secretary of _____, a corporation, and that the seal affixed to the foregoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said _____ and _____ duly acknowledged that they each had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth.

Witness my hand and official seal this _____ day _____, 19__.

_____,
_____.

My commission expires _____.

DEPARTMENT OF THE INTERIOR, UNITED STATES INDIAN SERVICE

OSAGE AGENCY,

Pawhuska, Okla., , *19*__.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be ---------- See my report of even date.

----------,

(*Official title.*)

55 OFFICE OF INDIAN AFFAIRS,

Washington, D. C., ----------, *19*__.

Respectfully submitted to the Secretary of the Interior with recommendation that it be ----------

----------,

Commissioner.

WASHINGTON, D. C., ----------, *19*__.

The within lease is ----------

----------,

Secretary of the Interior.

(Form C)

* * * * * * *

ACREAGE

11. After the approval of leases to sublessees as provided in sections 1 to 9, inclusive, of these regulations, no person, firm, partnership, joint stock association, or corporation will be permitted to acquire any interest in Osage lands for oil purposes by lease, assignment, drilling contract, or otherwise in excess of 4,800 acres.

HOW TO ACQUIRE LEASES OF TRIBAL LANDS

12. Should the Osage tribal council or any person or corpo-
56 ration desire to have any particular tract of land offered for lease, written request to that effect should be submitted to the superintendent, who will promptly transmit such request to the Commissioner of Indian Affairs with his recommendation.

At such times as the Secretary of the Interior may direct the superintendent shall publish in such manner as shall be deemed appropriate notices that specific tracts of Osage lands will be offered at public auction for lease to the highest responsible bidder.

The successful bidder must deposit with the superintendent on the day of sale a certified check on a solvent national bank in an amount equal to 20 per cent of the bid, as a guaranty of good faith. The superintendent after each sale shall furnish a list of all successful bidders to the Commissioner of Indian Affairs with the recommendation of the Osage tribal council.

The right is reserved by the Secretary of the Interior to reject any and all bids and to disapprove and reject any lease made on

an accepted bid. Should any lease be disapproved after deposit made by bidder, the deposit shall be immediately returned.

13. Upon being notified of the acceptance of its bid, a corporation shall file a certified copy of articles of incorporation, and evidence showing compliance with local corporation laws if a foreign corporation: *Provided*, That if any such papers have already been filed a statement to that effect may be submitted.

57 A corporation must also file with is first lease and on January 1 of each year and at such other times as may be required by the Secretary of the Interior a list of all officers, directors, and stockholders, with their post-office addresses, and showing the number of shares of capital stock held by each and whether held for themselves or in trust, together with a sworn statement of its proper officer, showing—

(a) The total number of shares of the capital stock actually issued, the number of shares actually sold, and specifically the amount of cash paid into the treasury on the stock sold, or, if paid in property, state kind, quantity, and value of same paid.

(b) Of the stock sold, how much per share remains unpaid and subject to assessment.

(c) How much cash the company has in its treasury and elsewhere, and from what sources it was received.

(d) What property, exclusive of cash, is owned by the company, and its value.

(e) What the total indebtedness of the company is and specifically the nature of its obligations.

At any time individual stockholders may be required to show to the satisfaction of the Secretary of the Interior in what companies or with what persons or firms they are interested in oil or gas mining leases on the Osage Reservation and whether they hold such interests for themselves or in trust.

58 Leases made by corporations shall be accompanied by an affidavit (Form E) showing the authority of its officers to execute leases, bonds, and other papers.

(Form E)

* * * * * * *

14. A successful bidder shall file an application for approval of lease (Form A), giving the information called for therein, and will be allowed 30 days from date of notice of acceptance of bid within which to execute leases and otherwise comply with these regulations. Failure on the part of an applicant to comply with the requirements shall operate as a forfeiture of the amount deposited as a guarantee of good faith. Delivery of lease shall be withheld pending payment of balance of any bonus, and if such balance be not paid within 20 days after notice by the superintendent of the approval of the lease, the approval shall be revoked and the deposit forfeited, in the discretion of the Secretary of the Interior.

(Form A)

APPLICATION FOR APPROVAL OF _____ LEASE, OSAGE RESERVATION

To the SECRETARY OF THE INTERIOR:

_____, of _____, designated as the
59 applicant, hereby applies to have approved the accompanying lease embracing _____ acres of Osage lands, and agrees that this application shall be considered a part of the lease so described.

The applicant solemnly swears that the lease, for which the approval is requested, is taken in good faith in the interest and for the benefit of the applicant, and not for speculation or transfer, or as agent for, or in the interest or for the exclusive benefit of, any other person, corporation, or association; that no other person, corporation, or association has any interest, present or prospective, directly or indirectly, therein, and that there is no understanding or agreement, express or implied, by which the land leased or any interest in or under the lease by working or drilling contract or otherwise, is to be used, sublet, assigned, or transferred without the consent of the Secretary of the Interior first obtained, but that it is taken for the purpose of operation and development under the direction, supervision, and control of the applicant, except as herein stated.

In addition to the leases in the name of the applicant for which approval is requested, the affiant solemnly swears that the applicant is not interested, either directly or indirectly, in _____ mining leases of lands in the Osage Reservation, except with the following-named persons, corporations, or associations, and that the aggregate of all these interests, together with the leases held by the applicant alone is not more than _____ acres:

60 (Names of person, corporation, or association with whom applicant is interested:)

_____

(Post-office address:)

_____

The applicant hereby states that his general business experience for the past five years has been as follows: _____

_____

The applicant's financial condition at this time is _____

_____

It is further stated that the applicant's resources are as follows:

_____

and that he has available at least $_____ for the development of the land covered by said lease.

Where the applicant is a corporation it hereby shows that at this time it has $_____ paid-up capital and $_____ in its treasury available for oil and gas operations.[1]

[1] Corporations shall furnish with their first application the additional financial showing required by the regulations.

It is hereby agreed that on the issue, transfer, or cancellation of stock of corporations or changes in officers prompt reports will be made thereof as required by the regulations.

The books and accounts of the applicant covering the business to be carried on under this lease, if approved, will be kept at _____, in the custody of _____.

61 References:[2]

_____, P. O. _____

_____, P. O. _____

_____, P. O. _____

Executed this _____ day of _____, 191__, at _____ _____

_____

Before me a notary public in and for the county of _____, State of _____, personally appeared _____, who, being first duly sworn according to law, depose__ and say__ that the foregoing application was signed by proper authority and in good faith for the purpose therein stated, and that the statements made therein are true as _____ verily believes__.

[L. S.] _____,

Notary Public.

My commission expires _____.

15. Oil lessees shall furnish with each oil lease, to be filed at the time the lease is presented, a bond upon Form D, with two or more sureties, or with a surety company duly authorized to execute bonds. Such bonds shall be in the sum of $1,000 for each

62 quarter section or fractional quarter-section unit covered by the lease: Provided, however, That the lessee shall be allowed to file one bond, Form G, covering all leases to which he or they are or may become parties, instead of a separate bond in each case, such bond to be the penal sum of $15,000.

Gas lessees are required to furnish with each gas lease a bond of the same character in the sum of $5,000 when the gas lease covers 25,000 acres or less, $15,000 for a lease covering more than 25,000 but not more than 50,000 acres, and $25,000 for a lease covering more than 50,000 acres.

The right is specifically reserved to increase the amount of any such bond above the sum named in any particular case where the Secretary of the Interior deems it proper to do so.

(Form D)

* * * * * * *

(Form G)

* * * * * * *

[2] Bank references are preferred.

16. Any person, other than a lessee or an allottee or the heirs of a deceased allottee, claiming an interest in any leased tract, or in damages thereto, must furnish to the superintendent a statement in writing showing his interest, and failure to furnish such state-
63 ment shall constitute a waiver of notice and estop said person from claiming any part of such damages after the same shall have been disbursed.

17. Lessees and those acting under them shall not conduct operations within or upon any homestead selection without the written consent of the Secretary of the Interior.

If the allottee is unwilling to permit operations on his homestead, the superintendent will direct the inspector to make an examination of the premises with the allottee and the lessee, or his representative, and should the inspector be of the opinion that the interests of the Osage Tribe requires that the particular tract be developed he will endeavor to have the parties agree upon the terms under which operations on the homestead may be conducted.

In the event the allottee and the lessee can not, with the assistance of the inspector, agree on the matter, the allottee shall be permitted to go before the Osage tribal council, and the council, after hearing the allottee, the lessee, and the inspector, shall make such recommendations as it deems proper. Guardians, legal or natural, may represent their Indian wards, and where no one is authorized or where no person is deemed by the superintendent to be a proper party to speak for a minor or person of unsound mind or of feeble understanding, the principal chief of the Osage Tribe shall represent them.

Rental in lieu of development shall not begin to run on any
64 homestead selection until the consent of the Secretary of the Interior to operations on such homestead shall have been given.

18. Each and every lessee and assignee shall, from the date of approval of lease or assignment, maintain an office at Pawhuska, Okla, with an agent upon whom service of process may be had in conformity with the laws of the State of Oklahoma, and who shall have authority to represent and speak for the lessee or assignee in controversies affecting any individual member of the Osage Tribe.

19. Lessee shall comply with all orders or instructions issued by the superintendent or inspector within the time specified, and shall allow the lessor and his agents, or any authorized representative of the Secretary of the Interior, to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection; and shall further agree to keep a full and correct amount of all operations, receipts, and disbursements and make reports thereof, as herein required, and their books and records, showing manner of operations and persons interested, shall be open at all times for the examination of any authorized representative of the superintendent or of the Secretary of the Interior.

20. Royalties on all oil and gas produced in any month shall be paid on or before the 25th day of the month next succeeding, and the remittances shall be accompanied by sworn reports covering all operations whether there has been production or not. Lessees shall show in this statement the total amount of oil and gas sold, and not merely their working interest, and also the dates of discovery and beginning of utilization of gas from gas wells. The lessee may include in one sworn statement all leases upon which there is no production or upon which dry holes have been drilled.

ASSIGNMENTS

21. Approved leases or any interest therein may be sublet, transferred, or assigned with the consent and approval of the Secretary of the Interior and not otherwise. Subleases, transfers, or assignments, when so approved, shall be subject to the terms and conditions of the original leases and the regulations under which such leases were approved, as well as to such additional requirements as the Secretary of the Interior may prescribe. The sublessee, transferee, or assignee shall furnish with his sublease, transfer, or assignment a satisfactory bond as hereinbefore prescribed in connection with leases.

Any attempt to sublease, transfer, or assign an approved lease or any interest therein without the consent and approval of the Secretary of the Interior shall be absolutely void and shall subject the original lease to cancellation in the discretion of such Secretary.

(Form F)

* * * * * * *

22. Wherever notice is provided for in these regulations, unless otherwise specifically stated, it shall be sufficient if notice has been mailed to the last-known place of address of the party, and time shall begin to run from the day next ensuing after the mailing or from the date of delivery of personal notice; but where the party is outside the State of Oklahoma the superintendent may, in his discretion, increase the time allowed.

OPERATIONS

23. No operations shall be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior.

POWERS AND DUTIES OF INSPECTORS

It shall be the duty of the inspector—

24. To visit from time to time leased lands where oil and gas mining operations are being conducted, and to inspect and supervise such

operations with a view to preventing waste of oil and gas, damage to oil or water bearing formations, or to coal measures or other mineral-bearing deposits, or injury to property or life, in accordance with the provisions of these regulations.

25. To make reports to the superintendent and to the Bureau of Mines as to the general conditions of the leases, property, and the manner in which operations are being conducted and his orders complied with.

67 26. To consult and advise with the superintendent as to the condition of the leased lands, and to submit information and recommendations from time to time for safeguarding and protecting the property of the lessor and securing compliance with the provisions of these regulations.

27. To give such orders or notices as may be necessary to secure compliance with the regulations and to issue all necessary instructions or orders to lessees to stop or modify such methods or practices as he may consider contrary to the provisions of such regulations.

28. To modify or prohibit the use or continuance of any operation or method which, in his opinion, is causing or is likely to cause any surface or underground waste of oil or gas, or injury to any oil, gas, water, coal, or other mineral formation, or which is dangerous to life or property, or in violation of the provisions of these regulations.

29. To prescribe, subject to the approval of the superintendent, the manner and form in which all records or reports called for by these regulations shall be made by the lessee.

30. To prohibit the drilling of any well into any producing sand when in his opinion and with the approval of the superintendent the marketing facilities are inadequate, or insufficient provision has been made for controlling the flow of oil or gas reasonably to

68 be expected therefrom, until such time as suitable provision can be made.

31. To prescribe or approve the methods of drilling wells through coal measures or other mineral deposits.

32. To determine when and under what conditions a producing well may be drilled deeper, and under what conditions a producing well, or sand, may be abandoned.

33. To require that tests shall be made to detect waste of oil or gas or the presence of water in a well, and to prescribe or approve the methods of conducting such tests.

34. To require that any condition existing subsequent to the completion of a well which is causing, or is likely to cause, damage to an oil, gas, or water bearing formation, or to coal measures, or other mineral deposits, or which is dangerous to life or property, be corrected as he may prescribe or approve.

35. To approve the type or size of separators used to separate the oil, gas, or water coming from a well.

36. The inspector may limit the percentage of the open-flow capacity of any well which may be utilized when, in his opinion, such action is necessary to properly protect the gas-producing formation.

37. The inspector shall be the sole judge of whether his orders have been fully complied with and carried out.

DUTIES OF LESSEES

38. Before actual drilling or development operations are commenced on the leased lands, or within not less than 30 days from the date of approval of these regulations, in case of producing leases or leased lands on which such operations have been commenced prior to such approval, the lessee or assignee shall appoint a local or resident representative within Osage County of Oklahoma on whom the superintendent or other authorized representative of the Department of the Interior may serve notices or otherwise communicate with in securing compliance with these regulations, and shall notify the superintendent of the name and postoffice address of the representative so appointed.

In the event of the incapacity or absence from the county of such designated local or resident representative, the lessee shall appoint some person to serve in his stead, and in the absence of such representative or of notice of the appointment of a substitute any employee of the lessee upon the leased premises, or the contractor or other person in charge of drilling or related operations thereon, shall be considered the representative of the lessee for the purpose of service of orders or notices as herein provided, and service upon any such employee, contractor, or other person shall be deemed service upon the lessee.

39. Five days prior to the commencement of drilling operations lessee shall submit, on forms to be furnished by the superintendent, a report in duplicate showing the location of the proposed wells.

40. Lessee shall keep upon the leased premises accurate records of the drilling, redrilling, or deepening of all wells, showing formations drilled through, casing used, together with other information as indicated on prescribed forms to be furnished by the superintendent, and shall transmit such and other reports of operations when required by the superintendent.

41. Lessee shall furnish on the 1st day of January and the 1st day of July of each year a plat, in manner and form as prescribed by the superintendent, showing all wells, active or abandoned, on the leased lands, and other related information. Blank plats will be furnished upon application.

42. Lessee shall clearly and permanently mark all rigs or wells in a conspicuous place with the name of the lessee and the number

or designation of the well, and shall take all necessary precautions for the preservation of these markings.

43. Lessee shall not drill within 300 feet of boundary line of leased lands, except with the consent of the superintendent. Lessees shall not locate any well or tank within 200 feet of any public highway or any building used as a dwelling, granary, barn, or established watering place, except with the written permission of the superintendent.

71 44. Lessee shall notify the superintendent in advance of intention to use the mud fluid process of drilling, so that the inspector may approve the method and material to be used in the event the operator is not familiar with this process.

45. Lessee shall provide a properly prepared slush pit, into which all sand pumpings and other materials extracted from the well during the process of drilling shall be deposited. Such sand pumpings and materials shall not be allowed to run over the surface of the land. The construction of such pits shall be subject to the approval of the inspector.

46. Lessee shall effectually shut out and exclude all water from any oil or gas bearing stratum and take all proper precautions and measures to prevent the contamination or pollution of any fresh-water supply encountered in any well drilled for oil or gas.

47. Lessee shall protect to the satisfaction of the inspector each productive oil or gas bearing formation drilled through for the purpose of producing oil or gas from a lower formation.

48. Lessee shall place an approved gate valve or other approved controlling device on the innermost string of casing seated in the well, and keep same in place and in proper condition for use until the well is completed, whenever drilling operations are commenced in "wildcat" territory or in a gas or oil field where high

72 pressures are known to exist, whenever the inspector shall deem same necessary for the proper control of the production from the well.

49. When natural gas is encountered in commercial quantities in any well, lessee shall confine such gas to its natural stratum until such time as the same can be produced and utilized without waste, it being understood that a commercial quantity of gas produced by a well is any unrestricted flow of natural gas in excess of 2,000,000 cubic feet per 24 hours: Provided, That if in the opinion of the superintendent gas of a lesser quantity shall be of commercial value the superintendent shall have authority to require the conservation of said gas. Water shall not be introduced into any well where such introduction will operate to kill or restrict the open flow of gas therein.

50. Lessee shall separate the oil from the gas when both are produced in commercial quantities from the same formation or under such conditions as might result in waste of oil or gas in commercial quantities.

51. Lessee shall not use natural gas from a distinct or separate stratum for the purpose of flowing or lifting the oil.

52. Lessee shall prevent oil or gas, or both, from escaping from any well into the open air, and not permit any oil or gas well to go wild or to burn wastefully.

53. Lessee shall not use natural gas in place of steam to
73 operate engines or pumps under direct pressure, except with the special permission of the inspector.

54. Lessee shall not use natural gas in flambeau lights, save as authorized or approved by the inspector.

55. Lessee shall use every possible precaution, in accordance with the most approved methods, to stop and prevent waste of natural gas and oil, or both, at the wells and from connecting lines and to prevent the wasteful utilization of such gas about the well.

56. Lessee shall notify the superintendent a reasonable time in advance of starting work of intention to redrill, deepen, plug, or abandon a well; and whenever the superintendent or inspector has given notice that extra precautions are necessary in the plugging of wells in a particular territory lessee shall give at least three days' advance notice of such intended plugging.

57. Lessee shall not abandon any well for the purpose of drilling deeper for oil or gas unless the producing stratum is properly protected, and shall not abandon any well producing oil or gas except with the approval of the superintendent or where it can be demonstrated that the further operation of such well is commercially unprofitable.

58. Lessee shall plug and fill all dry or abandoned wells on the leased lands in the manner required, and where any such
74 well penetrates an oil or gas bearing formation it shall be thoroughly cleaned to the bottom of the hole before being plugged or filled, and shall then be filled with mud-laden fluid of a consistency approved by the inspector, from the bottom to the top thereof, before any casing is removed from the well, or, in lieu of the use of such mud fluid, each oil and gas bearing formation shall be adequately protected by cement or approved plugs, or by both such plugs and cement, and the well filled in above and below such cement or plugs with material approved by the inspector.

Where both fresh water and salt water are encountered in any dry or abandoned well which is not being filled with mud-laden fluid as hereinbefore provided, the fresh water shall be efficiently protected against contamination by cement or approved plugs, or by both such cement and plugs, to be placed at such points in the well as the inspector shall approve for the protection of the fresh water.

59. If such abandoned or dry well be in a coal bed or other mineral vein deposit, or be in such condition as to warrant taking extraordinary precautions, the inspector may require such variations in the above-prescribed methods of plugging and filling as may be neces-

sary in his judgment to protect such seam or deposit against infiltration of gas or water and to protect all other strata encountered in the well.

60. The manner in which such mud-laden fluid, cement, or plugs shall be introduced into any well being plugged and the type of plugs so used shall be subject to the approval of the inspector.

In the event the lessee or operator shall fail to plug properly any dry or abandoned well in accordance with these regulations, the superintendent may, after five days' notice to the parties in interest, plug such well at the expense of the lessee or his surety.

61. All B-S or water from tanks or wells shall be drained off into proper receptacles located at a safe distance from tanks, wells, or buildings, to the end that same may be disposed of by being burned or transported from the premises.

Where it is impossible to burn the B-S, or where it is necessary to pump salt water in such quantities as would damage the surface of the leased land or adjoining property, or pollute any fresh water, the lessee shall notify the superintendent, who shall give instructions in each instance as to the disposition of such B-S or salt water.

62. Lessee shall make a full and complete report to the superintendent of all accidents or fires occurring on the leased premises.

63. Lessee shall provide approved tankage of suitable shape for accurate measurement, into which all production of crude oil shall be run from the wells, and shall furnish the superintendent copies of accurate tank tables and all run tickets, as and when requested.

64. The superintendent may make arrangements with the purchasers of oil for the payment of the royalty, but such arrangements, if made, shall not relieve the lessee from responsibility for the payment of the royalty, should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due: Provided, That no oil shall be run to any purchaser or delivered to the pipe line or other carrier for shipment, or otherwise conveyed or removed from the leased premises, until a division order is executed, filed, and approved by the superintendent, showing that the lessee has a regularly approved lease in effect, and the conditions under which the oil may be run. Lessees shall be required to pay for all oil or gas used off the leased premises for operating purposes; affidavit shall be made as to the production used for such purposes and royalty paid in the usual manner. The lessee or his representative shall be present when oil is taken from the leased premises under any division order and will be responsible for the correct measurement thereof and shall report all oil so run.

The lessee shall also authorize the pipe-line company or the purchaser of oil to furnish the superintendent with a monthly statement, not later than the tenth day of the following calendar month, of the

gross barrels run as common-carrier shipment or purchased from his lease or leases.

65. Lessee will not be permitted to use any timber from any Osage lands except under written agreement with the owner, and
77 in all cases where lands are restricted such agreement shall be subject to the approval of the superintendent or inspector. Lessee shall, when requested by the superintendent, furnish a statement under oath as to whether the rig timbers were purchased on the leased tract, and if so, state the name of the person from who purchased, and give such other information regarding the procurement of timber as the superintendent may desire.

66. The use of and damages to surface of lands shall be settled as provided in the lease.

67. Failure to comply with any provision of the lease or of these regulations shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a fine or not more than $500 per day for each and every day the terms of the lease or of the regulations are violated, or the orders of the superintendent pertaining thereto are not complied with, or to both such fine and cancellation, in the discretion of the Secretary of the Interior: Provided, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the superintendent, whose finding shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the superintendent's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

68. These regulations shall become effective and in full force
78 from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties to the lease.

69. Applications, leases, and other papers must be upon forms prescribed by the Secretary of the Interior, and the superintendent will furnish prospective lessees with such forms at a cost of $1 per set.

Form A.—Application for oil and gas lease, including financial showing.

Form B.—Oil lease.

Form C.—Gas lease.

Form D.—Bond.

Form E.—Authority of officers to execute papers.

Form F.—Assignment.

Form G.—Collective bond.

All sums received from sale of forms shall be placed in a special fund, to be expended under the direction of the Commissioner of Indian Affairs for the expenses necessary to carry out these regulations.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
August 26, 1915.

79 The foregoing regulations are respectfully submitted to the Secretary of the Interior with the recomendation that they be approved.

E. B. MERITT,
Assistant Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR,
August 26, 1915.

Approved:

FRANKLIN K. LANE.

AMENDMENT NO. 1 TO REGULATIONS APPROVED AUGUST 26, 1915, GOVERNING THE LEASING OF LANDS IN THE OSAGE RESERVATION FOR OIL AND GAS MINING PURPOSES. APPROVED MAY 22, 1916

Section 68 of the regulations provide:

"These regulations shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of lease, rate of royalty, rental, or acreage, unless agreed to by both parties to the lease."

Section 7 of said regulations provide as follows:

"In the event that no acceptable offer is received at the
80 public sale for any producing oil unit, the sublessee shall be permitted to continue the development and operation of such unit and to have a lease on the same, and such acreage shall not be considered as a part of the 4,800 acres which he is entitled to hold under these regulations."

In view of the misinterpretation and understanding of section 7 and in accordance with the provisions of section 68 said section 7 is hereby modified and changed to read as follows:

"In the event that no acceptable offer is received at the public sale for any producing oil unit any such unit shall thereafter be disposed of or leased in such manner as the Secretary of the Interior may direct."

FRANKLIN K. LANE.

AMENDMENT NO. 2 TO THE REGULATIONS OF AUGUST 26, 1915. APPROVED JULY 8, 1916

"Where casing-head gas is sold by the oil lessee as provided in paragraph 12 of oil leases executed in accordance with the regulations of the department, approved August 26, 1915, he shall pay one-sixth of the proceeds of such sale to the United States Indian super-

intendent as royalty for the Osage Tribe, and where such gas is used by the lessee for the manufacture of gasoline he shall pay one-sixth of the value thereof to such superintendent as royalty, such
81 value to be the general average value of gas of like kind and quality in the vicinity, such general average to be ascertained by the United States Indian superintendent from written contracts for sale of gas on file at the Indian agency. In all cases where casing-head gas is used by the lessee in the manufacture of gasoline, the same shall be metered in accordance with the terms of the lease and under such rules and regulations of the department as may be in force governing the sale: Provided, That should such gas be sold or disposed of in any manner other than by the oil lessee in the operation of his lease after extracting the gasoline there shall be paid to said superintendent for the Osage Tribe a royalty of one-sixth of the proceeds of such sale: Provided further, That all contracts for sale of such casing-head gas shall contain a clause requiring a minimum price for such gas of four cents per thousand cubic feet at a pressure of ten ounces to the square inch. The price of four cents per thousand cubic feet shall be based on a price of eight cents or less per gallon for the finished product. Should the price of this product during any month be greater than eight cents per gallon, then the price of gas shall be greater than four cents per thousand cubic feet by one-half cent per thousand cubic feet for each one cent increase in the price per gallon of gasoline. For example: Should such price of gasoline be eleven cents per gallon, then the price would be five and one-half cents per thousand cubic feet for gas. If such price of the product be twelve cents per gallon, then the price for gas should be six cents, and so on. Such price shall be determined by the
82 best price paid for casing-head gasoline at gasoline plants by any responsible dealer during the calendar month during which such casing-head gas is delivered."

In United States District Court

Opinion

THOMSON, *J.:*

These two actions involving the same legal questions are brought by the executor of the last will and testament of Glenn T. Braden, deceased, to recover back the amount of certain taxes assessed on the income of decendent from a certain lease for oil and gas purposes from the Osage Tribe of Indians under lands located in Osage County, Oklahoma. The taxes were paid by the decedent to the respective collectors of internal revenue under protest to avoid distraint and sale of decedent's property. An affidavit of defense identical in character was filed in each case, and the parties recognizing that the facts on which plaintiff's right of recovery depends are not in dispute, and that the fundamental questions involved are of law, have filed stipulations of record covering the material facts, leaving the issue, one of law, for the determination of the court. Under the

admissions in the pleadings as modified by the stipulations, the following facts appear:

1. The oil deposits in question in Osage County, Oklahoma, were and still are the exclusive property of the Osage Indian Tribe, and in its capacity as a tribe or nation.

2. The Osage Tribe of Indians have at all times been, and
83 now are wards of the National Government; the relation of the United States as guardian of said tribe rests upon treaty obligations, acts of Congress and policies adopted by the Government in dealing with the tribe, and the tribe has at all times been, and now is, considered by the United States as a dependent people.

3. From time immemorial all tribal funds and property, including the oil deposits in question, of the Osage Tribe of Indians have been and are held in trust for them as wards of the Government of the United States as their guardian, and this status as to these oil deposits will not expire before April 7, 1946. The acts of Congress which deal with these matters are special and not general acts.

4. Under the terms of this legislation the setting apart of the land under which are these oil deposits was in order to provide the tribe with a reservation, and the same was so set apart for them.

5. Under this legislation the oil and other minerals covered by these lands were reserved for said period for the use of the tribe, the royalty in respect thereof to be paid to the tribe, the leases for all oil to be made by the Osage Tribe, through its tribal council, with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe, all funds belonging to the tribe, which may become due, or found to be due to the tribe, to be held in trust by the United States.

84 6. The rules and regulations which, by the stipulations, are made a part of the statement of claim are pursuant to the special congressional legislation and contain a copy of the form of the oil mining leases.

7. The United States, by virtue of this guardianship relation, has exercised absolute dominion and control as guardian over these oil deposits, and is, and has been at all times, holding the same in trust for the use and benefit of the Indians, except that the lease, as stated, made pursuant to these acts of Congress, is required by Congress to be executed by the tribal council, but is not valid unless approved by the Secretary of the Interior.

8. Glenn T. Braden, the decedent, in his lifetime was owner of an interest in such a lease in respect of said oil deposits, from a date prior to the year 1917, as oil lessee, under due approval by the Secretary of the Interior, to-wit, as to a particular portion of the property of the said tribe, and as described in paragraph 8 of the plaintiff's statement of claim, and in compliance with the terms of said lease and the rules and regulations of the Department of the Interior, Braden drilled a number of oil wells thereon and produced large quantities of oil therefrom.

9. The royalty which the said Braden, under the terms of said lease, was to pay on the oil produced from the lease was 16⅔ per cent of the gross proceeds from the sale of the oil produced thereon from wells producing one hundred barrels or less and exceeding that amount, 20 per cent.

85 10. Upon threat of the respective collectors to enforce payment of the taxes assessed, with penalties and interest, by distraint and sale of his property, Braden paid the taxes set forth in the statements of claim under protest, no part of which has been refunded.

In these circumstances the question is, as the law now stands, can the United States lawfully assess and collect from the lessee of the lands of its ward, the Osage Indian Tribe, a tax on the net income arising from such lease?

If the State of Oklahoma were attempting by legislative act to levy a tax for the support of the State from this same net income of the lessee, it would certainly fail. The Supreme Court has distinctly announced certain principles in decisions closely touching the question now before the court which would not only preclude the State from collecting such tax, but by analogy are practically conclusive against the Government's claim.

The taxing powers of a State are of the broadest character. This is an incident of sovereignty, and all subjects over which the sovereign powers of a State extend are objects of taxation. Concerning these the Federal Government undertakes to exercise no supervision or control, never attempting to interfere unless the State taxation results in national interference. In Shaffer vs. Carter, 252

86 U. S., page 37, the Supreme Court quoting from Justice Brewer in a former case, said:

"We have had frequent occasion to consider questions of State taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the Nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. The power of taxation, however, vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business * * *. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

But vast as the powers of State taxation are, they must not and can not interfere with the functions and operations of the Federal Government.

In Choctaw, Oklahoma & Gulf Railroad Company vs. Harrison, 235 U. S. 292, appellant was a railroad corporation with power to lease and operate coal mines in the region formerly known as Indian Territory, now in the State of Oklahoma. The Choctaw and
87 and Chickasaw Indians, as wards of the United States, owned a large area of segregated and unallotted lands containing coal deposits which are not subject to taxation by the State. In 1908 the State of Oklahoma passed an act entitled "An act providing for the levy and collection of a gross revenue tax from * * * persons, firms, corporations, or associations engaged in the mining or production of coal." The act subjects every such person, firm, association, or corporation engaged in the mining or production, within the State, of coal to a gross revenue tax, which was in addition to the taxes levied and collected on an ad valorem basis upon such mining property, and the appellant, declining to pay the tax assessed upon the gross receipts for sales, the sheriff was about to enforce the demand by levy. The lower court and the Supreme Court of Oklahoma held that the effect of the act was to lay a valid tax on personalty, and sustained the levy and assessment. This was reversed by the Supreme Court, that tribunal saying:

"From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency can not be subjected to an occupation or privilege tax by a State. (McCulloch v. Maryland, 4 Wheat. 316, 425; and Farmers Bank v. Minnesota, 232 U. S. 516.)

But it is insisted that the statute rightly understood prescribed
88 only an ad valorem imposition on the personal property owned by the appellant—the coal at the pit's mouth—which is permissible according to many opinions of this court."

But the court held that:

"Neither State courts nor legislature by giving a tax particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect."

The court held the clear purpose of the act is to reach all sales and secure a certain percentage thereon, and in effect the statute prescribes an occupation tax, which, under the statutes, the State had no legal power to enforce against the appellant.

In Indian Territory Illuminating Oil Company vs. State of Oklahoma, 240 U. S. 522, the Osage Tribe of Indians made a lease which conferred the privilege of prospecting, drilling wells, mining, and producing petroleum and natural gas upon lands in Oklahoma territory. The appellant oil company was assignee of the lease and opposed the claim of Oklahoma that it was subject to tax, asserting that under the lease and assignment it became "a Federal agent in the development of the lands of the Indians and that its business, license, or permit as such can not be taxed by the State government."

The Supreme Court held that oil leases of land in Oklahoma made by the Osage Tribe of Indians, under authority of the acts of February 28, 1891, and March 3, 1905, are under the protection of the Federal Government, and the lessee is a Federal instrumen-
89 tality, and the State can not, therefore, tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. The court said:

"A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they can not be taxed as entities, they can not be taxed vicariously by taxing the stock, whose only value is their value."

The court cited with approval the case of Choctaw & Gulf Railroad vs. Harrison, supra, and held that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

A case identical with the case at bar, except that the question was as to the power of the State to tax, is Gillespie vs. Oklahoma, 257 U. S. 501. Under the laws of Oklahoma every person of the State is made liable to a tax upon his entire net income arising from all sources, except such as is exempt from taxation by some law of the United States or of the State. The State sought to hold the defendant liable for taxes upon the net income derived by him as lessee from leases of restricted Indian lands, the leases being of the same kind as that dealt with in Choctaw & Gulf Railroad v. Harrison, and the Indian Territory Illuminating Oil Company vs. Oklahoma. The Supreme Court of Oklahoma held the tax valid, reversing the court
90 below. The Supreme Court reversed the judgment. The court cited with entire approval the two cases above referred to and held that a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them; and that the step from this to the invalidity of the tax upon income from the leases is not long; that the same considerations that invalidates a tax upon the leases invalidates a tax upon the profits of the leases, and that a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

These cases establish beyond controversy the invalidity of such a tax as is levied here if the same were assesed and levied by the State of Oklahoma. Keeping in mind the principles thus enunciated and the reasons upon which they are based—is the tax here sought to be imposed by the Federal Government against the proceeds of the lands of its ward a valid tax? The question of the limitation of the power of Congress to levy such a tax, if it definitely attempted to legislate for that purpose, is not involved in this controversy. Over taxation Congress has almost unlimited power, and I am not prepared to say that under such power it could not levy a tax upon the lands of its ward or the proceeds derived from those lands. The

real question is, has Congress attempted to do any such thing through the legislation heretofore enacted? It is conceded that all tribal funds and property of the Osage Tribe, including the oil deposits in question, have been and are "inalienable in any form and subject to no form of encumbrance," and it is clear that if the Government levied a tax which the Indians were either unable or unwilling
91 to pay involuntary sale of the property would result. It would seem that to encumber the lands of its ward by the lien or burden of taxes would be wholly inconsistent with its trust to protect the property of the tribe from all forms of alienation and encumbrance. Under the character of the trust existing between the Government and the Osage Tribe it would seem impossible for the former to subject the lands of the latter to taxation without a clear violation of the trust which it owes to its comparatively defenseless wards.

The question we have is one of intent, of the proper interpretation of the law as it is written. The income tax laws are general statutes, and on this account, as well as upon other settled principles of interpretation, an intent by implication will not be imputed to Congress to tax the ward for the benefit of the guardian. The very opposite would be assumed and it would require the most explicit words to manifest an intention on the part of Congress to do this clearly improper thing. It was held in Evans vs. Gore, 253 U. S. 245, that the sixteenth amendment simply removed obstacles and did not create sources of taxation, and that the function of the revenue acts, in pursuance of that amendment is to reach all recognized sources of taxation, but not to enlarge them. "Any source" clearly means any recognized taxable source—not taxable as a matter of power, but as a matter of intent not to depart from the settled and absolutely just policies of the Government toward the Indians as its wards. The Supreme Court has held in many cases that the Indian wards
92 are favored in the interpretation of Federal statutes, and it is a well-recognized canon of construction that statutes levying taxes are construed most strongly against the Government and in favor of the citizen. That such construction as contended for by the Government is not sound is held by Attorney General Sargent in an opinion in relation to the Quapaw Indians, rendered March 20, 1925, approved by the Secretary of the Treasury. The Attorney General there held that there was nothing in the treaty or acts of Congress with respect to the Quapaw Indians in so many words, stating that the Quapaw lands should be free from taxation. But there, as here, the word was "inalienability," and he reached the conclusion that "inalienability" in that case meant freedom from taxation or interference in any way by the Federal Government, and in passing noticed that the lands that they had relinquished had not been subject to any such taxation or interference. His conclusion was:

"In order to make this restriction against alienation properly effective it would seem that inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise * * *."

This decision was in harmony with the conclusion of Attorney General Daugherty in an opinion rendered March 15th, 1924, and approved by the Secretary of the Treasury. The opinion involved the question whether income received by the individual members of the Five Civilized Tribes of Indians from tax-exempt lands allotted in severalty by the United States is subject to taxes imposed
93 by the revenue acts. In supporting his conclusion that they were not subject to taxation, he used this language:

"While these funds (incomes) are in the hands of the Federal Government, kept in the United States Treasury, and not paid out or pledged except under the consent of the Government, a State has no right to tax them.

If a State cannot tax them the question arises, Is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"

As the exercise of taxing power by Oklahoma might destroy the value of the lands to the Indians, so, probably, the exercise of like taxing power by the Government would have such destructive effect. Braden, the decedent in this case, is not taxed, not because the United States was without power to tax him but because in the discharge of its obligation as guardian it has refused to exercise such power to the manifest detriment of its wards.

Being of the opinion that the power exercised by the Government is not supported either on principle or by authority, judgment will be entered for the plaintiff against the collector of internal revenue in each of said cases for the amounts set forth in the respective statements of claim, with interest from the several dates when payment was made.

94 In United States District Court

Stipulation re printing record and abiding by the decision of No. 3272 Law

The defendant in the above case having this day sued out a writ of error from the Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Western District of Pennsylvania from the judgment entered on March 6, 1926, as of December 31, 1925, it is hereby stipulated by and on behalf of the the plaintiff in error and the defendant in error that since the questions in this case are identical with those involved in the writ of error at No. ———, ————, term, 1926, of the Circuit Court of Ap-

peals for the Third Circuit, and the material portions of the record in said other case are the same in this, no transcript shall be printed in this case, and the decision in this case shall abide by and follow the decision in the other case at said No. ———, ———— term, 1926.

Dated March 23, 1926.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff,
(Deft. in Error).
JOHN D. MEYER,
W. J. AIKEN,
Attorneys for Defendant,
(Pltf. in Error).

95 In United States District Court

Assignments of error

And now, to wit, March 23rd, A. D. 1926, comes the plaintiff-in-error by John D. Meyer, United States Attorney, and W. J. Aiken, Assistant United States Attorney, attorneys for said plaintiff-in-error, and in connection with the petition for writ of error says that in the record, proceedings, and in the final judgment aforesaid manifest error has intervened, to the prejudice of the plaintiff-in-error, to-wit:

1. The court erred in not sustaining the affidavit of defense, raising questions of law of the plaintiff-in-error, the defendant below, in answer to the statement of claim of the plaintiff below and the defendant-in-error here.

2. The court erred in entering judgment in favor of the defendant-in-error, the plaintiff below, and against the plaintiff-in-error, the defendant below, in the sum of $411,127.07.

3. The judgment ordered by the court to be entered is contrary to law.

By reason whereof the plaintiff-in-error prays that the judgment aforesaid may be reversed, etc.

JOHN D. MEYER,
United States Attorney.
W. J. AIKEN,
Assistant United States Attorney.

96 In United States District Court

Stipulation re printing record

The defendant in the above case having this day sued out a writ of error from the Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Western District of

Pennsylvania from the judgment entered on March 6, 1926, as of December 31, 1925, it is hereby stipulated by and on behalf of the plaintiff in error and the defendant in error that the following portions of the record in this case shall be printed and constitute the transcript of

1. Statement of claim, to and including the affidavit thereto attached. After which there shall be inserted in parenthesis a statement to the effect that attached to the statement of claim are four exhibits, identified as A, B, C, and D, which are in due form and duly support the allegations with respect to said exhibits in the statement of claim, but the details thereof not being material to the questions before the Court of Appeals or considered relevant thereto the exhibits are not printed.

2. The amendment to the statement of claim, with a like memorandum in parenthesis explaining the non-printing of Exhibit E thereof.

3. Affidavit of defense.

4. Defendant's motion to strike, without printing, the rule to show cause.

97 5. The agreement between the parties in this case and in the case at No. 3271 Law, of the same plaintiff against the former collector, which is the subject of the written writ of error at No. , term, 1926, which agreement is dated December 7, 1925.

6. The stipulation by and on behalf of the parties hereto, filed June 10, 1925, together with " Exhibit 1 " thereof, except Forms C, E, D, G, and F.

7. Opinion of Thomson, J.

8. The docket entries.

9. The stipulation, dated March 23, 1926, at No. 3271 Law, explaining why the transcript of the record of No. 3271 is not printed and agreeing to abide by the decision of this case.

10. Assignments of error.

11. Also this stipulation.

Dated March 23, 1926.

ALLEN & UNDERWOOD,
STERRETT & ACHESON,
Attorneys for Plaintiff
(Deft. in Error).
W. J. AIKEN,
Attorney for Defendant
(Pltf. in Error).

98 [Clerk's certificate to foregoing transcript omitted in printing.]

99 [Minute entry of argument and submission, Nov. 1, 1926, omitted in printing.]

100 In United States Circuit Court of Appeals for the Third Circuit. No. 3478, October term, 1926

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT BELOW, PLAINTIFF IN ERROR

VS.

THE COLONIAL TRUST COMPANY, EXECUTOR OF GLENN T. BRADEN, DECEASED, PLAINTIFF BELOW, DEFENDANT IN ERROR

No. 3479, October term, 1926

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT BELOW, PLAINTIFF IN ERROR

VS.

COLONIAL TRUST COMPANY, EXECUTOR OF GLENN T. BRADEN, DECEASED, PLAINTIFF BELOW, DEFENDANT IN ERROR

Opinion

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

BUFFINGTON, C. J.

These cases involve the question, not whether Congress has the power to tax income arising from lands of the Osage Indians, but whether it has exercised that power in the passage of the income tax law. These cases arise under the following facts: By due and joint action of the tribal council and the United States authorities an oil lease on royalty was granted to Glenn T. Braden, the decedent, on certain Osage Indian tribal lands. In pursuance thereof he drilled wells and produced large quantities of oil. Upon his income, so accruing, the Government assessed the tax which his executor paid under protest and thereafter sued the Government to recover back. Such recovery was had, whereupon the collector and the former collector took these appeals.

After due consideration had we find no error in the lower court's action and its judgments are affirmed. The question involved is one of such far-reaching importance as to warrant this court in preparing the full opinion it had intended doing, but a restudy of the opinion delivered by the judge below satisfied us that it is so com-

prehensive, convincing, and illustrative of our view that we
101 adopt it as the opinion of this court and restrict ourselves to summarizing the conclusion reached by ourselves and on which we had purposed to vindicate our action.

First. The oil in place was land (Marshall v. Mellon, 179 Pa. State 371). A tax on the income of that oil was a tax on land, and pro tanto a burden on the tribe in leasing its land for oil purposes—Gillespie v. Oklahoma, 257 U. S. 501, where it is said, "A tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

Second. That at the date of the passage of the income tax act the Osage Indians did not stand in the same relation to the United States as its citizens, but were by the United States regarded as wards under its guardianship and their property under its control and management—Elk vs. Wilkins, 112 U. S. 94, where it is said, "They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian"; Winton vs. Amos, 255 U. S. 373, where it is said, "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage and dependency."

Third. That as legislation imposing taxation by Government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizen (Gould vs. Gould, 245 U. S. 151; United States vs. Field, 255 U. S. 257), any legislation by Government imposing taxation on its dependent ward must be in certain and indubitable terms (Choate vs. Trapp, 224 U. S. 665).

Fourth. That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the Government to regard and deal with the Indian tribes as wards and dependents the purpose and intent of Congress to change that policy and impose a tax by Government on its ward will not be implied, and the general terms of the income tax statute should not be construed to embrace the Indian wards of the Government. In support of this reference is made to the Quapaw Indians (34 Opinions Attorney General 439), where it is said, "In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian"; and Choate vs. Trapp, supra, where it is said, "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are
102 wards of the Nation, and dependent wholly upon its protection and good faith."

A conclusion in line with United States v. Rickert (188 U. S. 432, and Elk vs. Wilkins, 112 U. S. 94), where it is held that general acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation.

The judgments of the district court are affirmed.

[File indorsement omitted.]

103 In United States Circuit Court of Appeals for the Third Circuit

No. 3478 (List No. 19). October term, 1926

C. G. LEWELLYN, FORMER COLLECTOR, PLAINTIFF IN ERROR

vs.

COLONIAL TRUST CO., EXR., GLENN T. BRADEN, DEC'D., DEFENDANT IN error

Judgment

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 11, 1927.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

104 In the United States Circuit Court of Appeals for the Third Circuit

No. 3479 (List No. 20). October term, 1926

D. B. HEINER, COLLECTOR, PLAINTIFF IN ERROR

vs.

COLONIAL TRUST CO., EXR., GLENN T. BRADEN, DEC'D., DEFENDANT IN error

Judgment

Filed Jan. 11, 1927

In error to the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 11, 1927.

Per curiam.

BUFFINGTON, *Circuit Judge.*

[File indorsement omitted.]

105 [Clerk's certificate to foregoing transcript omitted in printing.]

106 Supreme Court of the United States

[Titles omitted.]

Order allowing certiorari

Filed May 16, 1927

The petition herein for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

MAY 16, 1927.

○

INDEX

	Page
Petition:	
Statement	2
Assignment of errors	4
Reasons for granting the petition	4
Brief:	
Opinions below	6
Jurisdiction	6
Question presented	6
Statutes involved	7
Statement	8
Argument	8
Conclusion	11

CITATIONS

Cases:	
Brunt, Leah, Appeal of, 5 B. T. A. 134	10
Choctaw & Gulf R. R. Co. v. *Harrison*, 235 U. S. 292	8
Gillespie v. *Oklahoma*, 257 U. S. 501	8
Howard v. *The Oil Companies*, 247 U. S. 503	8
Indian Territory Illuminating Oil Co. v. *Oklahoma*, 240 U. S. 522	8
Jaybird Mining Co. v. *Weir*, 271 U. S. 609	8
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	10
Thomas v. *Gay*, 169 U. S. 264	10
Statutes, etc.:	
Revenue act of 1916, c. 463, 39 Stat. 756, as amended by the revenue act of 1917, c. 63, 40 Stat. 300, 329—	
Sec. 1 (a)	7
Sec. 2 (a)	7
Annual Report of Commissioner of Indian Affairs for year ending June 30, 1926, pp. 12, 13	5
34 Op. A. G. 275, 439	9

In the Supreme Court of the United States

OCTOBER TERM, 1926

Nos. ——

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-third District of Pennsylvania, petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE will of Glenn T. Braden, deceased

---

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL Revenue for the Twenty-third District of Pennsylvania, petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE will of Glenn T. Braden, deceased

---

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General on behalf of D. B. Heiner, Collector of Internal Revenue for the 23rd Pennsylvania District, and C. G. Lewellyn, former Collector of said district, prays that writs of certiorari issue to review the judgments of the Circuit Court

of Appeals for the Third Circuit (R. 101) entered in the above cases on January 11, 1927, affirming the judgments of the United States District Court for the Western District of Pennsylvania (R. 2).

STATEMENT

These cases involve the question whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that for 1921, income derived from the sale of oil extracted from Osage Indians tribal lands by a non-Indian operating lessee is exempted from taxation. The question is not one of power, but of the intention of Congress as expressed in the statute. The statutes imposed an income tax on income received "from all sources by every individual * * * subject only to such exemptions and deductions as are hereafter allowed * * *" so as to include "gains or profits, and income derived from any source whatever." Into this statute the Circuit Court of Appeals has read an implied exemption of the income of a lessee of tribal lands, derived from operations under the lease.

The facts are not in dispute and the case was tried to the court on a stipulation of facts. (R. 31.)

In the court below the record was not printed in the *Lewellyn case*, because of a stipulation that it would abide the outcome of the *Heiner case*. (R. 94, 97.)

Prior to 1917 (R. 10) Glenn T. Braden, a white citizen of the United States, procured an oil lease

from the Tribal Council of the Osage Tribe of Indians in Oklahoma covering a portion of the lands of said tribe in that State. This lease was on a form prescribed by the Secretary of the Interior, was approved by that officer as required by law, and was made subject to lawful rules and regulations then in force or thereafter promulgated by the Secretary of the Interior. Braden as lessee agreed to pay the Superintendent of the Osage Indian Agency for the lessor, as royalty, the sum of 16⅔% of the gross proceeds from the sale of oil produced by him, or 20% if the quantity of oil taken from oil producing wells on any quarter section during any calendar month exceeded 100 barrels per well per day. (R. 11.) The lessee was required to commence drilling operations within a specified time or, upon failure to drill, to pay a specified rental periodically.

As a result of his development of the land thus leased, Braden, during the period from 1917 to 1921, inclusive, produced oil therefrom in large quantities. From the sale of his part of said oil, exclusive of royalty, he derived income during said period upon which there was assessed and collected income and excess-profits taxes in the sum of $822,346.20.

Braden died on September 23, 1923, and his executor, the respondent, on April 4, 1925, filed two suits against the respective Collectors to whom the above tax had been paid for the recovery thereof. Judgment for the plaintiffs in each case was ren-

dered by the District Court, and these judgments were affirmed by the United States Circuit Court for the Third Circuit.

ASSIGNMENT OF ERRORS

1. The court erred in holding that the income of a non-Indian operating lessee of Osage Indian tribal lands derived from the sale of oil extracted therefrom was exempt from taxation under the Federal Revenue Acts.

2. The court erred in holding that to tax income derived by a non-Indian operating lessee of Osage Indian tribal lands from the sale of oil extracted therefrom was to tax said Indians and that said income was therefore exempt from the taxes imposed by the Federal Revenue Acts.

REASONS FOR GRANTING THE PETITION

I. The language of the statutes is express. It covers the income of all individuals from any source whatsoever, with only those exemptions provided in the Act. The Act does not by its terms exempt income derived by lessees of Indian lands from operations under their leases. The court was not warranted in reading into the statute an implied exemption. Reading into the statute an implied exemption of Indians' income is going far enough in support of the governmental policy toward Indians. It does not follow that because a State may not tax such income Congress has not intended to tax it. Many incomes derived from sources which

render them immune from State taxation are taxed under the Revenue Acts. The question involved is a substantial one.

II. Under each Revenue Act the Bureau of Internal Revenue has consistently held that income derived by operating lessees of Indian lands is taxable. This is the first case in which any decision has been rendered to the contrary. Under this construction of these statutes very large sums have been collected by the United States. In the consideration of this petition the Treasury Department has estimated that the amount of taxes collected, and which will be refundable if the decision of the Circuit Court of Appeals in this case is sustained, is $150,000,000.

III. As bearing on the future operation and effect of the decision below, attention is called to the Annual Report of the Commissioner of Indian Affairs for the year ending June 30, 1926, p. 12, which discloses that there were then in force in the Osage Indian and Five Civilized Tribes oil and gas leases covering 566,602 acres and 785,535 acres, respectively, and that the gross production of oil thereunder for that year was 41,907,021 barrels. The same report, on page 13, shows that 6,976 acres of restricted Quapaw Indian lands were under lease and that 289,622 tons of lead and zinc were produced. On the usual royalty basis, the income of mineral lessees of the lands of the Osage, Quapaw and the Five Civilized Tribes of Indians for the one

year covered by the report was in excess of $98,000,000. The report also discloses, page 12, that oil leases were in force covering lands of the Navajo Indians in New Mexico and other reservations in Oklahoma and in Idaho.

Wherefore, it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

APRIL, 1927.

SUPPORTING BRIEF

OPINIONS BELOW

The opinion of the District Court (R. 82) is reported in 12 F. (2d) 481. The opinion of the Circuit Court of Appeals (R. 99) is reported in 17 F. (2d) 36.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered January 11, 1927. (R. 101.) The jurisdiction of this Court to issue the writ is found in the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that for 1921, income derived from the sale of oil extracted from Osage Indians' tribal lands by a non-Indian operating lessee is exempted from taxation. The question is not one of power, but of the intention of Congress as expressed in the statute.

STATUTES INVOLVED

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

> That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax * * * (here follow the rates).

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917 (c. 63, 40 Stat. 300, 329), defines income as follows:

> That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The pertinent sections of the later applicable Revenue Acts and definitions of gross and net income are not substantially different from those above quoted and are not here set out in full.

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition.

ARGUMENT

As the court below said in its opinion, this case is one of far-reaching importance. (R. 100.) It is settled that the income in question may not be taxed by a State.

Choctaw & Gulf R. R. Co. v. *Harrison,* 235 U. S. 292.

Indian Territory Illuminating Oil Co. v. *Oklahoma,* 240 U. S. 522.

Howard v. *The Oil Companies,* 247 U. S. 503.

Gillespie v. *Oklahoma,* 257 U. S. 501.

Jaybird Mining Co. v. *Weir,* 271 U. S. 609.

But although a State may not tax it, Congress has the power to do so, and the question is one of intention to be derived from the terms of the Revenue Acts.

These Acts are explicit in taxing the income of "every individual" derived "from any source," subject only "to such exemptions and deductions as are hereinafter allowed." There is no suggestion in the terms of the statute that income of those who deal with and make profit out of transactions with Indians shall be exempt. The exemption, if it exists, must be read into the statute by implication.

In March, 1924, the Attorney General rendered an opinion that income received by individual members of the Five Civilized Tribes of Indians from

tax-exempt lands allotted in severalty by the United States was not subject to Federal income taxes. He reached this conclusion by reading into the statute an implied exemption based on the proposition that a taxing statute of the United States should not be construed to apply to such income of Indians unless it expressly so stated. 34 Op. 275.

In March, 1925, he rendered another opinion to the same effect respecting the income of the Quapaw Indians derived from their restricted lands. 34 Op. 439.

The conclusions of the courts below in the present case purport to be based largely on the reasoning of the Attorney General in these two cases, but it is clear that the courts below have taken a step in advance of anything that the Attorney General has decided.

In the first opinion the Attorney General held that if allotted lands or tribal lands are inalienable, there is an implied exemption of the income from the lands from taxation by the United States, and in the second opinion it was held that there is an implication that Congress intended to exempt the income of Indians derived from such lands from income taxation. In the present case, an additional implied exemption is resorted to, to the effect that Congress must have intended that those buying oils from the Indians or extracting oils under leases from the Indians are exempt from in-

come taxes on the profits they derive through the disposition of what they so acquire.

This problem resembles the house that Jack built, and there must be some point at which implied exemptions from taxation cease.

See *Thomas* v. *Gay,* 169 U. S. 264; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.

Even the opinions of the Attorney General that the income of the Indians from their restricted lands is intended by Congress to be exempted from income taxation have not been accepted by the Board of Tax Appeals. *Appeal of Leah Brunt,* 5 B. T. A. 134.

It does not necessarily follow that Congress has intended to exempt from taxation those things which the States have no power to tax. On the contrary, a different policy has been pursued by Congress with respect to many subjects, such as compensation of Federal officers, which may not be taxed by the States, but which Congress has intended to and does tax.

The theory advanced to sustain the decisions below is that the taxation of the income of the Indian lessees throws a burden on the Indians, because if the lessee were exempt from taxation on the income he derives from the operation of his lease he would probably take that into account in negotiating the lease and offer a higher royalty than he would if he must pay income taxes. This is altogether theoretical and not practical. Certainly, those who have heretofore obtained Indian

oil leases have not fixed the amount of their rents or royalties with any such consideration in mind. No court has heretofore held that their income should be exempt, the Treasury Department has consistently held it is taxable, and it is not conceivable that Braden, the deceased lessee in this case, who took his lease in 1917, or any other lessee under similar conditions, gave any weight to the prospect of its being ultimately held that his income from operating the lease would be tax exempt, or that the Indians benefited to any extent by that prospect.

CONCLUSION

The case is one of very great importance to the Treasury; the sustaining of the decision below confronts the Treasury with the possibility of refunds in an estimated aggregate sum of $150,000,000; the question is a new one, and it can not be said that the decision below is so obviously right as not to merit argument.

It is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

APRIL, 1927.

○

INDEX

	Page
Opinions of the court below	1
Jurisdiction	2
Question presented	2
The statutes	2
Statement of the facts	3
Specification of error to be urged	5
Summary of argument	5
Argument:	
Congress had power to tax the income derived by the lessee of Indian oil lands from the operation of his leases. The tax is imposed by the plain terms of the Revenue Acts, and no exemption should be implied	6

CITATIONS

Cases, etc.:	
Bank of Commerce v. *Tennessee*, 161 U. S. 134	11
Choctaw & Gulf R. R. Co. v. *Harrison*, 235 U. S. 292	7
Gillespie v. *Oklahoma*, 257 U. S. 501	7, 10
Howard v. *The Oil Co.*, 247 U. S. 503	7
Indian Oil Co. v. *Oklahoma*, 240 U. S. 522	7
Jaybird Mining Co. v. *Weir*, 271 U. S. 609	7
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	10
34 Op. A. G. 275; id. 439	8
Statutes:	
Revenue Act of 1916 (c. 463, 39 Stat. 756)—	
Sec. 1(a)	2
Sec. 2(a), as amended by the Act of 1917 (c. 63, 40 Stat. 300, 329)	2
Revenue Act of 1919 (c. 18, secs. 210, 213, 40 Stat. 1057, 1062, 1065)	3
Revenue Act of 1921 (c. 136, secs. 210, 213, 42 Stat. 227, 233, 237)	3

63848—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 219

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, for the Twenty-third District of Pennsylvania, Petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE Will of Glenn T. Braden, deceased

---

No. 220

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL Revenue for the Twenty-third District of Pennsylvania, Petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE Will of Glenn T. Braden, deceased

---

BRIEF ON BEHALF OF PETITIONERS

OPINIONS OF THE COURT BELOW

The District Court rendered an opinion (R. 41–47) which is reported in 12 F. (2d) 481. The opinion of the Circuit Court of Appeals (R. 50–51) is found in 17 F. (2d) 36.

JURISDICTION

The judgments to be reviewed were rendered on January 11, 1927. (R. 52.) Petition for certiorari was filed April 8, 1927, and granted May 16, 1927 (R. 53), pursuant to Section 240, Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question is whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that of 1921, income derived from the sale of oil extracted from Osage Indians' tribal lands by a non-Indian operating lessee is exempted from taxation.

THE STATUTES

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

> That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax * * * [here follow the rates].

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917 (c. 63, 40 Stat. 300, 329), defines income as follows:

> That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in

> whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The pertinent sections of the later applicable Revenue Acts and definitions of gross and net income are not substantially different from those above quoted and are not here set out in full. They are Act of February 24, 1919, c. 18, 40 Stat. 1057, 1062, 1065, Sections 210, 213; Act of November 23, 1921, c. 136, 42 Stat. 227, 233, 237, Sections 210, 213.

STATEMENT OF THE FACTS

The facts are not in dispute and the case was tried to the court on a stipulation of facts. (R. 16.)

In the court below the record was not printed in the *Lewellyn case,* because of a stipulation that it would abide the outcome of the *Heiner case.* (R. 47, 48, 49.)

Prior to 1917 (R. 6) Glenn T. Braden, a white citizen of the United States, procured an oil lease from the Tribal Council of the Osage Tribe of Indians in Oklahoma covering a portion of the lands of said tribe in that State. This lease was on a form prescribed by the Secretary of the Interior, was approved by that officer as required by law,

and was made subject to lawful rules and regulations then in force or thereafter promulgated by the Secretary of the Interior. Braden as lessee agreed to pay the Superintendent of the Osage Indian Agency for the lessor, as royalty, the sum of 16⅔% of the gross proceeds from the sale of oil produced by him, or 20% if the quantity of oil taken from oil-producing wells on any quarter section during any calendar month exceeded 100 barrels per well per day. (R. 6, 7.)

As a result of his development of the land thus leased, Braden, during the period from 1917 to 1921, inclusive, produced oil therefrom in large quantities. From the sale of his part of the oil he derived income. He included this income yearly in his returns for 1917 to 1921, inclusive, and paid taxes thereon to Collector Lewellyn. In 1924, on an audit of his returns, some additional taxes aggregating, without interest, $352,991.52 (R. 10–13) were assessed and paid under protest to Heiner, then Collector. The claim for refunds, on the ground that the oil income was exempt, was first made in 1924. (R. 11.) The total amount of tax paid by Braden as the result of his including the oil income in his returns was much more than the additional taxes assessed in 1924, so recovery is sought of all the additional taxes assessed in 1924 and paid to Collector Heiner, and also of large sums paid by the taxpayer to Collector Lewellyn in 1918 to 1922 as taxes resulting from the inclusion in his returns for the years 1917 to 1921 of the income derived

from the oil lease. As the record in the *Lewellyn case* is not printed, we have only the figures for the additional amounts paid Heiner. These, with interest, amounted to $411,127.07, for which the District Court rendered judgment. (R. 1.)

Braden died on September 23, 1923 (R. 3), and his executor, the respondent, on April 4, 1925, filed two suits against the respective collectors to whom the above tax had been paid for the recovery thereof. Judgment for the plaintiff in each case was rendered by the District Court, and these judgments were affirmed by the Circuit Court of Appeals for the Third Circuit.

SPECIFICATION OF ERROR TO BE URGED

The court erred in holding that the income of a non-Indian operating lessee of Osage Indian tribal lands, derived from the sale of oil extracted therefrom was exempt from taxation under the Federal Revenue Acts.

SUMMARY OF ARGUMENT

Congress had power to tax the lessee's income, and the question is one of intention and statutory construction.

The Revenue Acts clearly tax all income of every individual and gain derived from any source whatever, subject only to the exemptions specified in the statutes. No exemption of income of lessees of Indian oil lands is found in the Acts, and none should be implied.

It does not follow from the fact that a State could not tax this income that Congress intended to exempt it.

The argument that exemption of the lessee's profits might result in larger royalties is no reason for writing an exemption into the statute by judicial legislation.

ARGUMENT

CONGRESS HAD POWER TO TAX THE INCOME DERIVED BY THE LESSEE OF INDIAN OIL LANDS FROM THE OPERATION OF HIS LEASES.—THE TAX IS IMPOSED BY THE PLAIN TERMS OF THE REVENUE ACTS, AND NO EXEMPTION SHOULD BE IMPLIED

That Congress had power to tax the income of the lessee is conceded. The question is whether it intended to exercise that power.

The Revenue Act of 1916 imposed the tax upon the "entire net income received * * * from all sources by every individual a citizen or resident of the United States," and provided that, "subject only to such exemptions and deductions as are hereafter allowed," the net taxable income should include gains from "the transaction of any business carried on for gain or profit" and gains "derived from any source whatever."

There is no suggestion among the expressed exemptions of an exemption of the income derived by a lessee of Indian oil lands from the operation of his lease.

The later Revenue Acts are substantially the same.

This language is clear and explicit. Unless the income in question is to be exempted by implication, it was taxed.

The first suggestion offered by the respondent is that the lessee was an agency of the United States, and that his income from these leases was beyond the taxing power of the State, and therefore it should be concluded that Congress did not intend to tax it. It is settled that the State had no power to tax such income.

> *Gillespie* v. *Oklahoma*, 257 U. S. 501;
> *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292;
> *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522;
> *Howard* v. *The Oil Co.*, 247 U. S. 503;
> *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609.

The last case cited said (p. 614):

> * * * In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians.

But it does not necessarily follow that Congress intends to exempt from Federal taxation what the States have no power to tax. On the contrary, a different policy has been pursued by Congress in respect of many subjects, such as compensation of Federal officers which it has intended to and does tax.

Merely because the States have no power to tax such income is no reason why Congress should be held to have intended to exempt it, when it has used language plainly including it in taxable income.

The other argument of the respondent is that the reasons given in the decisions of this Court holding the States without power to tax such income and in the opinions of the Attorney General holding that the income of the Indians themselves is not within the revenue laws lead to the conclusion that Congress intended to exempt this income.

In 34 Op. A. G. 275, March 15, 1924, the Attorney General held that the income of members of the Five Civilized Tribes from lands allotted in severalty, the alienation of which was restricted and which the United States had agreed with the Indians should be tax exempt while restricted, was not intended to be taxed.

In 34 Op. A. G. 439, March 20, 1925, the Attorney General held that the income derived by the Quapaw Indians from their restricted allotments were not intended to be taxed under the Revenue Acts because of the settled rule that general Acts of Congress are not ordinarily construed to apply to Indians, and also because Congress had by other statutes disclosed an intention that the allotments should be exempt from all taxes while restricted.

Neither of these opinions nor the decisions of this Court above cited require or support the decision below.

This tax is not on the Indians, their property, or income. It is on the income of those dealing with the Indians.

The theory of the respondent is that the taxation of the income of the lessees of Indian oil lands throws a burden on the Indians, because if the lessee were exempt, he would probably take that into account in negotiating the lease and offer a higher royalty. This is altogether theoretical and not practical. Certainly those who have heretofore obtained Indian oil leases have not fixed the amount of their rents or royalties with any such considerations in mind. The Treasury has from from the beginning consistently treated such income as taxable. Prior to the decision of the District Court in this case, December 31, 1925, no court had held such income exempt. In such circumstances, and considering the plain, all-inclusive language of the statutes, with no suggestion in them of an exemption, it is inconceivable that the respondent's decedent increased the royalty in reliance on the exemption.

It is not apparent how, at the time of making any such lease, the lessee could predict future tax rates with sufficient confidence to affect his offer of royalties.

The record in this case (R. 13, 11, 10) shows that the taxpayer, after his lease was made, "in ignorance of his legal rights," included such income

in his returns for 1917, 1918, 1919, and 1920 and made no claim for refund until 1924.

There must be some practical limit to implied exemptions in favor of the Indians, and that limit is passed when there is read into the Revenue Acts exemptions of the income of those who make profit from dealings with the Indians.

The case of *Gillespie* v. *Oklahoma, supra,* was urged upon this Court to support the claim that the income of consulting engineers of a State or municipality, in so far as it resulted from that service, was beyond the Federal taxing power, because to tax it increased the cost of operation of the municipality, but the argument was rejected. (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.)

That the Indians are wards of the United States is not a persuasive reason for exempting from taxation the income of those who make profit by dealing with them.

But whatever argument may be made in favor of the propriety of such an exemption, Congress has not yielded to it.

Besides the clear terms of the statutes referred to, we have their successive reenactment.

The Treasury Department has collected consistently and for years income taxes on the income of operating lessees of Indian oil lands. In connection with the petition for certiorari in this case it advised that such taxes, aggregating more than

$150,000,000, had been collected under the various Revenue Acts. Such an item is too large to have been overlooked. The enormous income which has been derived by Indians in Oklahoma and their lessees from oil lands has attracted wide attention. If Congress had been dissatisfied in 1917, in 1919, in 1921, in 1924, in 1926, when enacting Revenue laws, with the imposition of income taxes on and the collection of vast sums in such taxes from lessees of Indian oil lands, that dissatisfaction would have been reflected in a provision expressly exempting such income.

The reenactment of the all-inclusive language of these successive Revenue Acts with the reiteration of the provision that the taxes are subject only to the exemptions set forth in the statute is a legislative acceptance and approval of the interpretation of the Treasury Department.

As to exemptions from taxation it has been said:

> * * * There must be no doubt or ambiguity in the language used upon which the claim to exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power. [*Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.]

Here there is no provision in the statute on which the claim for exemption is based, and the court below has read one into it.

The judgment should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

A. J. WARD,
Special Attorney, Bureau of Internal Revenue.

SEPTEMBER, 1927.

○

Nos. 219-220

Office Supreme Court,
FILED
APR 29 1927
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

Sur Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

R. C. ALLEN,
I. J. UNDERWOOD,
Tulsa, Oklahoma.

JAMES R. STERRETT,
CHARLES ALVIN JONES,
M. W. ACHESON, JR.,
Pittsburgh, Pa.,
Attorneys for Respondent.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT ST., PITTSBURGH, PA.

Index to Respondent's Brief.

PAGES

Reasons for Denying Petition 1-2

Petitioners' Basic Confusion 2

Question Settled,—

To tax Lessee of Restricted Indian Mineral Land is to tax Indian:

Effect, in Negotiations to lease Tribal Minerals, on Amount of Indian Royalty, of Promulgation of a Tax on a Prospective Lessee's Profits from his Share of the Mineral 3-5

Federal Government's Duty as Indian Guardian, in leasing their Mineral Lands, to make the Best Terms that it can for Them 5-6

No Intent Implied from General Acts to tax the Wards for the Benefit of the Guardian in respect of their Specially Restricted Lands 7-11

Not a matter of Congress' Power, but of its Intent 11-12

Nor a matter of an "Exemption" in the Acts, but of their Purview 2, 8, 9, 10

Petitioners' Reasons not in Point 11-16

Conclusion 16

CITATIONS.

Cases: PAGE

Appeal of Leah Brunt, 5 B. T. A. 134 ..... 12, 13
Bowling v. United States, 233 U. S. 528, 535 8
Cherokee Nation v. Georgia, 5 Pet. 1, 17 ..... 5, 10
Cherokee Tobacco, 11 Wall. 616 13
Childers v. Beaver, 270 U. S. 555, 559 12
Choate v. Trapp, 224 U. S. 665, 675 8
Choctaw, etc., Railroad Company v. Harrison, 235 U. S. 292, 298 4
Daugherty v. Thompson, 71 Tex. 192, 202 5
Frost v. Wenie, 157 U. S. 46, 58 and 59 7
Gillespie v. Oklahoma, 257 U. S. 501, 504, 506 ..... 3, 4, 11, 12, 15
Gould v. Gould, 245 U. S. 151, 153 8
Hardy v. Waltham, 7 Pick. 108 5
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 529 4
Jaybird Mining Company v. Weir, 271 U. S. 609, 613 12
Jetton v. University, 208 U. S. 489, 501 5
Kansas Indians, 5 Wall. 737, 760 9
Mercantile Bank v. New York, 121 U. S. 138, 162 8
Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618, 621 to 624 2
Metcalf v. Mitchell, 269 U. S. 514, 519, 522 12
Missouri K. & T. Ry. Co. v. Meyer, 204 Fed. 140, 145 4
Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541, 544, 545 2
Morrison v. Work, 266 U. S. 481, 488 6
Oahu Ry. & Land Co. v. Pratt, 14 Hawaii 126, 129 3
Pearson v. Alexander, Collector (unreported) 13
Pollock v. Trust Co., 157 U. S. 429, and 158 U. S. 601, 618 ..... 3, 10

PAGE

Railroad Company v. Peniston, 18 Wall. 5, 36 4
Rodgers v. United States, 185 U. S. 83, 87, 88, and 89 7
Territory v. Annette Island Packing Co., 6 Alaska 585, 589 5
Thomas v. Gay, 169 U. S. 264 12
United States v. Candelaria, 271 U. S. 432, 439 6
United States v. Field, 255 U. S. 257, 262 8
United States v. Forty-three Gallons of Whiskey, 108 U. S. 491, 497, 498 13
United States v. Nice, 241 U. S. 591, 599 10
United States v. Rickert, 188 U. S. 432, 437, and 438 8
Washington v. Miller, 235 U. S. 422, 427 7
Weston v. Charleston, 2 Pet. 449, 468 5
Winton v. Amos, 255 U. S. 373, 392 6

Opinions Attorneys General, Etc.:

Kappler's Laws and Treaties, 2 Ed., Vol. 2, pp. 97 and 880 6
Opinions Attorneys General, Vol. 34, pp. 272, 285, sur Five Civilized Tribes 11
Opinions Attorneys General, Vol. 35, pp. 107, 109, sur Hopi Indians (to be reported) 9
Opinions Attorneys General, Vol. 34, pp. 439, 445, sur Quapaws 8, 9
Seligman on Shifting and Incidence of Taxation, 271, 272 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

Nos. .....

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, Deceased.

Sur Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

Reasons for Denying the Petition.

I. The real question these cases present has been settled by this Court.

II. The Circuit Court of Appeals has decided the

question in manifest accord with the applicable decisions of this Court; and (contrariwise),—

III. The petition neither invokes any of the reasons specified in Rule 35 concerning review on writ of certiorari of decisions of circuit courts of appeals, nor otherwise assigns valid ones.

This Court's decisions on all aspects of a question render it unsubstantial sur motion to affirm, or dismiss, hence a fortiori so sur an application for a certiorari.

Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618, 621-624.
Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541, 544, 545.

Imprimis, the petition and supporting brief mistakenly declare, that the court below—and the Attorneys General—have "by implication" read into the Revenue Acts an "exemption" in addition to the exemptions enumerated in the Acts—have read "into the statute an implied exemption"!

But, as the opinions all show, what, on the contrary, the court below and the Attorneys General hold, is that,—

> a specially restricted Indian tribal source is not within the *purview* of these general tax Acts, is not within the scope of Congress' intent to tax.
>
> (*Infra*, pp. 8, 9, 10.)

Such mistake, however, has been the Bureau of Internal Revenue's gratuitous man-of-straw in these cases from the beginning, and now it reappears *here* as the very thread of petition and supporting brief.

The Bureau's text also continues to confuse the two meanings of exempt—(1) "not subject to", and (2)

"excepted from the operation of"—and now means one, and now the other.

Turning therefrom to our contention, that no question of substance exists justifying a *certiorari*,—

The United States has never for its own benefit taxed its Indian wards, and it is settled that to tax their lessee of restricted Indian mineral land is to tax the Indian such that an intent to do so can not be implied from general Acts of Congress. Thus,—

I.

This Court has settled,—

(a) *That it is the Government's duty as Guardian of the Indians to make the best terms that it can for them in its negotiations to lease their mineral lands; and*

(b) *That promulgation of a tax on a prospective lessee's profits from his share of the mineral would reduce the royalty he would otherwise pay the Indians*:

1.

Gillespie v. Oklahoma, 257 U. S. 501, 504, 506:

Without any consent on the part of Congress in the premises, Oklahoma had laid an income tax on entire net income arising from all sources, and sought to hold her citizen Gillespie liable on income derived by him as lessee of restricted Osage Indian tribal oil lands from sales of his share of the oil received.

Taxing income, however, being to tax source (*Pollock v. Trust Co.*, 157 U. S. 429, and 158 U. S. 601, 618; *Oahu Ry. & Land Co. v. Pratt*, 14 Hawaii 126, 129), and these

tribal leases being under the National Government's protection as Indian Guardian (*Indian Territory Illuminating Oil Company v. Oklahoma,* 240 U. S. 522, 529), and Gillespie the instrumentality used by the United States to carry out its duties to the Osages,—

> a tax upon his profits from his leases "is a direct hamper" upon the Guardian's effort *to make the best terms that it can for its wards.*

The judgment of the Supreme Court of Oklahoma upholding such tax was accordingly reversed.

The lessee Braden, in the cases at bar, sustained precisely the same relation as did Gillespie to the Osage Indians (lessor of these same oil deposits) and to the United States as their Guardian, and under a substantially identical lease.

This Court had before it, in *Choctaw, etc., Railroad Company v. Harrison,* 235 U. S. 292, 298, an attempted Oklahoma tax in respect of a lessee's sales of *coal* produced under leases negotiated by the United States as Guardian of the Choctaw and Chicasaw Indians in discharge of its duty in respect to the opening and operating of those Indians' coal deposits.

Considering the "real nature and effect" of the tax—which is what controls (*Railroad Company v. Peniston,* 18 Wall. 5, ft. 36)—this Court striking that tax down cited, and reached the same conclusion as that in, *Missouri K. & T. Ry. Co. v. Meyer,* 204 Fed. 140, ft. 145, that such taxes

on *lessees* might deprive mineral leases *of all value to the Indians.*

Also, this Court held in *Weston v. Charleston,* 2 Pet. 449, 468, that taxing "must" affect terms, and observed, in *Jetton v. University,* 208 U. S. 489, 501, that the effect, on rent, of not taxing lessee, is something *readily seen,* just as the authorities show. *Daugherty v. Thompson,* 71 Tex. 192, 202; *Hardy v. Waltham,* 7 Pick. 108; *Seligman on Shifting and Incidence of Taxation,* 271, 272; etc.,—the burden, as the last named says, falling wholly on the landlord.

And how highly "practical" it is for Indians to have a tax-free lessee, is notably exemplified in the case of Alaskan Indians. In the negotiations on their behalf, the Secretary of the Interior insisted on an *agreement,* that if lessee were adjudged not subject to that territorial license tax, it "should pay an amount equal to the tax to the lessor", *Territory v. Annette Island Packing Company,* 6 Alaska 585, 589.

It being thus manifest and established that to tax prospective oil lessee is to tax Indian lessor,—

2.

This Court's Decisions Equally Settle the Federal Guardian's Duty in the Premises.

As ruled in *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, the Indians *depend* on the Guardian.

This Osage Nation, the United States, admittedly, received "under their protection",—the Osages acknowledg-

ing dependency. *2 Kappler's Laws & Treaties,* 2 Ed., pp. 97, 880.

As held in *Winton v. Amos,* 255 U. S. 373, 392, from this accepted dependency, the guardianship arises; and

In *United States v. Candelaria,* 271 U. S. 432, 439, it is pointed out how an unbroken current of judicial decisions have attributed to the United States the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.

Osage tribal ownership of these oil deposits and dependency as a people on the Government as their Guardian, the trust and its having originated under *special* federal enactments, this property being "inalienable" in any form and subject to no form of incumbrance, and the United States' holding it in trust for the Tribe as wards of the Government and having assumed the duty to protect it against all forms of alienation or incumbrance, are all matter of admission. (R. 4 to 10, 31).

Such trust, Indians have a right to have properly administered. *Morrison v. Work,* 266 U. S. 481, 488.

Beyond question, then, to get for the Osage Indians the best terms that it can—for *their oil*—was and is the Federal Guardian's plain duty in the premises.

Such, then, the settled consequence, in negotiations for royalty, of promulgating taxation of a prospective lessee's profits from Indian oil lands, and such the settled duty,—

II.

As to the suggestion that "the courts below have taken a step in advance of anything that the Attorney General has decided", it is, on the contrary, submitted that what both Courts and Attorneys General hold is no more than what this Court's beadroll of decisions has clearly foreclosed, to-wit, that,—

No intent to tax Indian wards or lessees of their mineral can be implied from general Acts of the Congress of the United States:

1.

The pertinent principles so laid down thus analyze,—

That, with respect to any subject,—Congress, having deliberately dealt with it *specially*, is presumed not to call it to mind in a later *general* Act where not expressly mentioned.

Rodgers v. United States, 185 U. S. 83, 87, 88, 89.

That,—Indian status is peculiarly within the principle, the "generality" of terms of the present Revenue Acts, as to income "from any source", not being a whit more sweeping than in the statutes in the following two cases, which, though "literally" embracing Indians, were adjudged not to be meant to include them.

Washington v. Miller, 235 U. S. 422, 427;
Frost v. Wenie, 157 U. S. 46, 58, and 59.

That, statutes levying taxes (a) are not extended

by implication, (b) are construed against the Government, and (c) in favor of the Indians.

United States v. Field, 255 U. S. 257, 262;
Gould v. Gould, 245 U. S. 151, 153;
Choate v. Trapp, 224 U. S. 665, 675.

That, Indian "restrictions" are impersonal, being laid on the land which it is the Government's duty to preserve against alienation.

Bowling v. United States, 233 U. S. 528, 535.

And, that it is no part of a Government's policy to tax its own instrumentalities for its own purposes.

Mercantile Bank v. New York, 121 U. S. 138, 162;
United States v. Rickert, 188 U. S. 432, 437, 438.

2.

Standing on this Court's decisions, the Attorney General, on Mar. 20, 1925, held, and the Secretary of the Treasury on Sep. 15, 1925, approved, that—no reference being made to Indians or their property in these same general Revenue Acts—*Quapaw* mineral income from specially restricted lands is not *within the purview* of those Acts because of the "inalienability" of the source, that,—

(a) "Inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise"; and

(b) That he could not by implication impute to Congress under *the broad language of these Acts* "an

> intent *to impose a tax* for the benefit of the Federal Government on *income* derived from the restricted property of these wards of the nation * * * In other words, it is not lightly to be assumed *that Congress intended to tax the ward for the benefit of the guardian".* (Italics ours). 34 *Op. Atty. Gen.* 439, 445.

The Osages' specially restricted property is likewise "inalienable" (R. 7), and so tax-free (*Kansas Indians,* 5 Wall. 737, 760), and their being still in tribal status (R. 6) makes it the clearer. And, in the cases at bar, defendants filed statutory demurrers, so that it is *admitted,* that as late as *1925* Osage minerals were *still* "inalienable" (R. 1, 7, 31)—hence, in that regard, admittedly, unaffected by the anterior Acts of 1916-17-19-21.

On June 24, 1926, the Attorney General advised that intent to tax income of Hopi tribal Indians "can not be assumed from the general provisions of the internal revenue laws, although broad in compass," that a dependent tribe does not come within their *"purview".* (To be reported as 35 *Op. Atty. Gen.* 107, 109).

How specious, the Bureau's view that the Attorney General reached his conclusions "by reading into the statute an implied exemption"!

What, on the contrary, Attorneys General, as well as Circuit Court of Appeals, discerned was, that the restricted source is not among those embraced by the taxing terms of the Acts, which is of course a very different thing from the generality of statutory terms including a subject

and its then being by an exemption taken out of their operation.

3.

Equally with Attorneys General, the Circuit Court of Appeals' conclusions were not other than as established by this Court's decisions, *supra,* namely,—

(a)

That, "any source," in these same *general* Acts, does not embrace restricted lands of a *domestic dependent nation* (*Cherokee Nation v. Georgia, supra*), the trust estate of the Government's wards which it has *specially* assumed the duty to protect (R. 7 and 31); particularly so (*U. S. v. Nice*, 241 U. S. 591, 599), when, uninterruptedly, Indian tribal properties have always been federally administered without tax or other benefit to the United States.

(b)

That, to tax income is to tax source, *Pollock v. Trust Co., supra.*

(c)

That, if, during the negotiations between prospective lessor and lessee over the *division* of probable mineral production, Oklahoma or United States (it makes no difference to a bargaining lessee which of them it is) announce an intention to take a share of the oil *for themselves* (in addition to that of the In-

dians), they at once reduce what the lessee could, or would, otherwise pay the Tribe:

As the Gillespie case makes plain, it is no "theoretical" matter (p. 506)—the hamper is "direct", and *that,* in its economic effect on the effort to make terms.

(d)

That, (as urged sur Five Civilized Tribes, 34 Op. Atty. Gen. 272, at 285), reasons on the ground of duty to the Indians impelling Congress to withhold consent to *Oklahoma's* taxing lessees' profits from tribal minerals are just as cogent—not as to the *power* —but as touching the *intention* of the fiduciary not to do the very same thing itself;

That, what on the score of duty, the Guardian did not let Oklahoma do, it has not itself done *impliedly.*

Unable to question the above, petitioners ignore it, and turn to the inconsequential:

III.

Petitioners' Positions.

1.

To the suggestion, that the Gillespie and like cases concern *State power* to tax tribal lessees' profits,—

(a) The ground of those decisions is *not* lack of State power to tax, but lack of *federal consent* to

State exercise of power (*Jaybird Mining Company v. Weir,* 271 U. S. 609, 613; *Childers v. Beaver,* 270 U. S. 555, 559);

(b) It was not just because it was *Oklahoma* that was doing the taxing of profits of lessees of Indian coal and oil. It was because of the *effect* of that sort of taxation in the light of the guardianship; and

(c) In a matter as to the federal Guardian's *intent* to exercise its own powers, its recognition of its duty in the premises by interfering with another sovereign's exercise of its power is highly relevant.

Thomas v. Gay, 169 U. S. 264, "obviously is more remote", as the Gillespie case rules (p. 506).

Metcalf v. Mitchell, 269 U. S. 514, 519, 522, concerned (a) the meaning of an express exemption from the operation of the 1917 Act's general taxing words, and (b) Congress' taxing a State instrumentality. The effect, on the State, of that consulting engineer's being within the purview of that federal Act was remote, and was adjudged so in *avowed contrast* to the Oklahoma Indian cases, *supra.*

2.

As to the Bureau's espousal now of the eight-to-six view of the Board of Tax Appeals in *Appeal of Leah Brunt* —in preference to the opinions of the Attorneys General,—

(a) That decision was on Feb. 2, 1927, directly overruled by a final judgment entered by Judge Cotteral of the District Court of the United States for

the Western District of Oklahoma in the unreported case of *October Pearson v. Alexander, Collector,* Case No. 172, never as yet (Apr. 25, '27) appealed from;

(b) The Board, misconceiving the Osage Allotment Act's stating *when* surface tax-freedom should *end* as an "exempting" from taxation, fallaciously inferred that the Act had opened to taxation the subsurface deposits, which, *admittedly,* are "inalienable" *still* (R. 7); and

(c), In relying on *Cherokee Tobacco,* 11 Wall. 616, overlooked *U. S. v. Forty-three Gallons of Whiskey,* 108 U. S. 491, 497, 498.

3.

Concerning petitioners' "Reasons"—*co numero,*—

(I.)

No one has read an exemption into the statutes (see pp. 2, 3 and 9 *supra.*); and

It is *not*—as permeates the Bureau text—that Congress "intended by the Acts to exempt" from their operation a source otherwise within their scope; but this restricted Indian source, *already* (specially) "exempt"—to use Bureau terminology—Congress did not mean to *include.*

(II.)

Petitioners' second reason is equally without merit.

The Circuit Court of Appeals, having thus held that taxes exacted on Braden's income as lessee of restricted

Osage tribal lands had been illegally collected, ordered their return. So much as he had paid before he died, he paid under protest *and duly filed and pressed his claim for refund therefor.* (Exh. A of earlier, or Lewellyn case, and Stipulation, identical with present record at R. 17 and 34, not printed because of R. 94). As to taxes paid after his sudden death, his Executors did likewise, suing herein promptly after the prerequisite of Bureau denial of refund (R. 17 and 34).

The amount of other possible refunds is not germane, either to the question of the Revenue Bureau's authority to collect such taxes or the Government's right to retain them.

(III.)

To petitioners' apprehensions as to the future operation and effect of the decision herein, the answer is that the policy to date of not bringing income from restricted Indian lands into the field of general taxation, confirmed below, still depends, as always, on express Congressional action seeking to serve not only the Government's material welfare but its fiduciary duty to a dependent people.

That the policy has benefited the Osages is evidenced by the fact that *their leases pay a much higher return in royalty for more limited rights* than the ordinary commercial lease in the same (mid-continent) field. (R. 11, 12 and 13; ft. 32).

It is *not,* therefore, as petitioners now suggest, "altogether theoretical and not practical". The Indians do enjoy greater royalty because of their lessee's not being taxed on income derived from their lands.

Braden's payment, as aforesaid, under protest of taxes on his income from Osage mineral and his prompt filing of

claim for refund equally confute petitioners' irrelevant supposition as to what he thought, when negotiating, as to any income tax liability, even were the question one as to the mental attitude of a lessee instead of the meaning of Acts.

4.

Driven by the decisions and the opinions of the Attorneys General, petitioners in their brief virtually concede that income from the oil in the Indians' hands has *not* been taxed, and that the Bureau's interpretation of the Acts would affect the royalty all Indians would *hereafter* get on their oil and gas and coal, but in their assignment intimate that, Braden having once bound himself, no subsequent *taking* of taxes from him could operate to abate the royalty of his covenant to pay by their *now* being shifted to the Tribe:

(a)

The cases at bar concern, *not* the obligation of a lease, but the scope of legislation.

It is not how a contract, once entered into, *binds,* but *what Congress meant by its Acts.*

They are the same Acts,—the scope petitioners would thus concede for tomorrow was the scope from 1916 on.

(b)

Neither is it a matter of *taking* taxes after a contract has been signed, but of their promulgation during its negotiation.

Gillespie had made *his* contract.

The "direct hamper" is *before signing*—is upon the

effort to make "terms", and is, of course, in respect of negotiations with any lessee.

Granted the income was Braden's, who was bound to pay royalty as stipulated, it was never a question of taxing his income as such, but of the nontaxing, in the 1916 and subsequent Acts, of income (whosesoever it might be) derived from restricted Indian lands demised under federal guardianship.

It is submitted,—

(a) That these cases are ruled by the decisions, *supra,*—that, Congress (because of a duty to get the Osage Indians full royalty) not having consented to a State's taxing their lessees' profits—which for a Guardian to do, would be the last thing to be presumed—no such intent can be *implied;*

(b) That, if the cases were pending on motion to affirm or dismiss, such motion would properly prevail. Hence the petition should be denied.

Respectfully submitted,

R. C. ALLEN,
I. J. UNDERWOOD,
JAMES R. STERRETT,
CHARLES ALVIN JONES,
M. W. ACHESON, JR.,

Attorneys for Respondent.

Office Supreme Court, U. S.
FILED
OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

NO. 219.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

NO. 220.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

JOHN W. DAVIS,
R. C. ALLEN,
C. A. JONES,
M. W. ACHESON, JR.,
Attorneys for Respondent.

Of Counsel:
JAMES R. STERRETT,
I. J. UNDERWOOD.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT ST., PITTSBURGH, PA.

Index to Respondent's Brief.

	PAGE
Opinions of Courts Below	1
Jurisdiction	2
Counter-Statement of Case	2
Argument	7
Summary	7, 8

ONE

I.	Taxing the Lessee of Restricted Indian Mineral Land on His Share of the Production is Direct in Its Effect on the Indian Lessors and to do this would be in Sustance to Tax the Indians on Their Royalty	8
II.	What, on the Score of Duty to Its Dependent Wards, the Guardian would not let Oklahoma do, It has not Itself done	15
III.	On Principle and in Practice, a Tax-Free Lessee Pays More Rent	17
IV.	Congress has not Taxed the Wards for the Benefit of the Guardian	21
V.	It has been Conceded by the Government that Congress has not Taxed the Osages on Their Oil Royalties	29

TWO

VI.	The Interpretation of the Acts is not to be Changed because of a Particular Lease having been Signed	32
VII.	There is no Attempt Here to Read an Exemption into the Revenue Acts. The Question is one of Scope of Intent with Reference to Indian Wards	33
VIII.	In Conclusion	35

Citations.

Cases: PAGE

Bank v. Tennessee, 161 U. S., 134, 135, 145, 146.... 34
Bowling v. United States, 233 U. S., 528, 535..... 25
Cherokee Nation v. Georgia, 5 Pet., 1, 17 22
Childers v. Beaver, 270 U. S., 555, 559..... 12
Choate v. Trapp, 224 U. S., 665, 675.....16, 22, 28
Choctaw, etc., Railroad Company v. Harrison, 235 U. S., 292, 298.....13, 14
Coal Co. v. Trapp, 38 Okla., 792, 794 13
Daugherty v. Thompson, 71 Tex., 192, 202..... 17
Davis v. Edmondson, 261 Pa., 199, 204..... 3
Frost v. Wenie, 157 U. S., 46, 58 and 59 .....27, 28
Gillespie v. Oklahoma, 257 U. S., 501, 504, 506.... .....8-12, 16, 18, 25
Gould v. Gould, 245 U. S., 151, 153..... 28
Hardy v. Waltham, 7 Pick., 108..... 17
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S., 522, 529.....10, 16
Jaybird Mining Company v. Weir, 271 U. S., 609, 613, 614..... 12
Kansas Indians, 5 Wall., 737, 760..... 25
LaMotte v. United States, 254 U. S., 570, 575..... 22
Marshall v. Mellon, 179 Pa., 371, 374..... 25
McCurdy v. United States, 264 U. S., 484, 486..... 25
Mercantile Bank v. New York, 121 U. S., 138, 162.... 16
Metcalf v. Mitchell, 269 U. S., 514, 519, 522..... 12
Missouri K. & T. Ry. Co. v. Meyer, 204 Fed., 140, 145 .....12, 13
Oahu Ry. & Land Co. v. Pratt, 14 Hawaii, 126, 129.. 25
Pearson v. Alexander, Collector (unreported)..... 29
Pollock v. Trust Co., 157 U. S., 429, and 158 U. S., 601, 618..... 25
Railroad Company v. Peniston, 18 Wall., 5, 36..... 9

PAGE

Rodgers v. United States, 185 U. S., 83, 87, 88 and 89 26
Territory v. Annette Island Packing Co., 6 Alaska, 585, 589 ..... 19, 20
United States v. Bean, 253 Fed., 1 25
United States v. Candelaria, 271 U. S., 432, 439 16
United States v. Field, 255 U. S., 257, 262 28
United States v. Moore, 284 Fed., 86, 90 25
United States v. Nashville, etc., Ry. Co., 118 U. S., 120, 126 16
United States v. Nice, 241 U. S., 591, 599 28
United States v. Payne, 264 U. S., 446 28
United States v. Ramsey, 271 U. S., 467, 469 22
Washington v. Miller, 235 U. S., 422, 427 27
Weston v. Charleston, 2 Pet., 449, 468 ..... 10, 17
Winton v. Amos, 255 U. S., 373, 392 22

Opinions Attorneys General, Etc.:

Cyc., Vol. 37, p. 865 16
Kappler's Laws and Treaties, 2 Ed., Vol. 2, pp. 97 and 880 22
Opinions Attorneys General, Vol. 19, pp. 161, 168.. 25
Opinions Attorneys General, Vol. 34, pp. 275, 285, sur Five Civilized Tribes 15
Opinions Attorneys General, Vol. 35, pp. 107, 108, 109, sur Hopi Indians 25, 26
Opinions Attorneys General, Vol. 34, pp. 439, 445, sur Quapaws 23, 24
Seligman on Shifting and Incidence of Taxation, 3 Ed., 271, 272 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

NO. 219.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

NO. 220.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

Opinions of Courts Below.

The decision herein by the District Court is reported in 12 F. (2d) 481 and by the Circuit Court of Appeals in 17 F. (2d) 36 and is,—

That the United States has never for its own

benefit taxed its Indian wards;

That for the Government to announce taxation of a Tribe's prospective lessee of restricted Indian mineral land on his share of the mineral, at the very time that as Guardian on behalf of the Indians it is negotiating with him for the lease, would only be to reduce the royalty otherwise obtainable for them and would be in reality to tax the Indian; and

That an intent by Congress to do this in the general Revenue Acts is not to be imputed by implication—Indians always being dealt with specially—their dependency on the Government, the fiduciary relationship, and Osage status as a Tribe alike forbidding the implication.

Jurisdiction.

The judgments to be reviewed were rendered on January 11, 1927 (R. 52, 53). Petitions on behalf of the Government for writs of certiorari were filed April 8, 1927 invoking the jurisdiction of this Court pursuant to Section 240, Judicial Code, as amended by the Act of February 13, 1925. The writs were granted May 16, 1927 (R. 53).

Counter-Statement of Case.

These cases arose on statutory demurrer, presenting the following as matter of admission (R. top and ft. 14; 6 Pur. Dig., Pa., 13th Ed. 7138, pl. 25; *Davis v. Edmondson*, 261 Pa. ft. 199, 204),—

1.

The National Government is Guardian of the Osage Indians, who are still in tribal status and as such constitute a dependent people.

The oil deposits in the lands which the Tribe owns and occupies in Osage County, Oklahoma, are the exclusive property of the Tribe in its capacity as Tribe or Nation.

By special federal enactments, these Osage oil deposits are, and always have been, inalienable in any form, subject to no form of incumbrance, and *held by the United States in trust for the Tribe as wards of the Government,* the United States having assumed, and continuing to assume, the duty of protecting this tribal property against all forms of alienation and incumbrance.

(R. 2 to 5)

2.

Prior to 1917 and until his death on September 23, 1923, Glenn T. Braden (respondent's decedent) was lessee in respect of these oil deposits under a lease from the Osage Tribe of Indians.

The lease was negotiated on behalf of the Indians by the United States as their Guardian, and in so doing the National Government was admittedly under a duty to make the best terms that it could for the Osages.

The ensuing royalty payable—and paid—by Braden under this lease to the Osage Indian Agency for the Tribe

(lessor) was greatly in excess of the royalty customarily paid by lessees under the commercial leases in the same (mid-continent) field.

(R. 5, 6)

3.

Against payment in taxes on his profits from this lease Braden personally protested to the Collectors and paid under duress and threat of distraint and sale of his property (R. mid. 9, 10, 11, and R. 43, item 10). Braden also promptly filed and duly pressed his claim for refund therefor. (Statement of Claim, Para. 17, and Exh. A, of the earlier-period, or Lewellyn, case, also Stipulation therein, on the Government's request not printed on writ of error, as per R. 47, 48, but now certified to this Court on respondent's petition to the District Court as hereinafter set forth).

As to the balance of the taxes, which were paid after Braden's death, his Executors did likewise, these suits being promptly brought after the prerequisite of Bureau denial of refund (R. 9-12, 17).

Lewellyn (defendant at No. 3271 in the District Court) was Collector during the period expiring Aug. 1, 1921,—Heiner (defendant at No. 3272) on and after that date. (R. 2).

4.

The District Court, holding that the Collectors had exacted these taxes without authority of law, ordered their return (R. 47). The taxes totaled $822,346.20, as correctly stated in the petition for certiorari. This amount is the sum of the $469,354.68 collected by Lewellyn and the

$352,991.52 collected by Heiner. Adding interest to the last named figure gives the $411,127.07 to which the Government in its present Brief now confines itself.

The District Court's judgments against the Collectors for these taxes and their interest, the Circuit Court of Appeals affirmed (R. 52, 53), the latter court's opinion being written in the later-period, or Heiner, case, in which the record was printed (R. 50, 51).

5.

The reason for the non-printing of the Lewellyn record, at the Government's instance in connection with its writs of error out of the Circuit Court of Appeals, was because of the two cases involving the same legal question, as well as because the "material" portions of the record in each case "are the same." (R. 47, 48.)

However, as the Government's Brief, twice, inadvertently states that claim was not made until 1924 (as was appropriately the case in the Heiner, or later, suit), we have had the presiding judge of the District Court under Rule 9, Sec. 3, certify to this Court the Statement of Claim and the Stipulation in the Lewellyn suit. They show as "true" that Braden himself, who died on Sept. 23, 1923, had duly filed *"his duly signed and sworn-to claim for refund"* of income taxes for the taxable year 1918 paid by Braden to Lewellyn in 1919, these taxes being the earliest payments embraced by the judgments herein.

Also, the District Court, in an opinion expressly applicable to both the Lewellyn and Heiner cases, found that,—

"Upon threat of the respective collectors to enforce

payment of the taxes assessed, with penalties and interest, by distraint and sale of his property, *Braden* paid the taxes set forth in the statements of claim *under protest,* no part of which has been refunded." (R. 43.)

Finally, as to the matter of Braden's inclusion of his income from this lease in his returns to the Government, on its forms, this was at the "demand" and by the "requirement" of the Treasury, its levy and assessment thereon against him for the very first year being "over his due objection." (R. ft. 9; 10 to 13.)*

As indicated, the judgments herein are predicated of the following,—

(a) That Congress has not taxed its Indian wards, (b) which to tax their mineral lessee would be to do:

---

*These cases were not tried—there was nothing to try—they were argued and disposed of on demurrer, the stipulations serving as voluntary Amendments. Those stipulations came about at the Government's suggestion and were prompted by the prospect and intention on its part (duly carried out) of demurring to our Statements of Claim after the stipulations had supplied the facts wanted by the Government.

The consideration tendered by the Government and accepted by the executor for the latter's consenting to the stipulations so as to make it satisfactory to the Government to demur, was the latter's assurance that, if its demurrers were overruled, there was no defense on the facts. Hence arose the portion of the stipulations as to the truth of the other facts alleged in the statements whereon the executor's right to recover rested.

ARGUMENT.

This case is one of statutory construction.

The question is whether under the general federal Revenue Acts the income of an Indian Tribe's lessee arising from a lease of the Indians' oil deposits, negotiated by the Government as the Indians' Guardian, is subject to tax.

The question presents itself in respect of the negotiations for the lease. The matter is one of the announcement of taxation of the lessee as affecting terms for the Indian owners.

The negotiations for the lease on behalf of the Indians are conducted by the Federal Government as the Indians' Guardian. The prospective lessee as well as lessor, and the lessor's agent or Guardian, must deal in the light of the burdens and profits to which the lease will give rise. No measure of burden or profit can be made without considering the presence or absence of taxation.

It is thus all a matter as to what, in this view, the Congress of the United States *meant by its taxing Acts*:

Our proposition is that,—

(a) By its general Revenue Acts, the United States has not for its own pecuniary advantage taxed a dependent Indian Tribe, who are its wards, on their trust estate restricted by prior special federal enactment; and

(b) For the United States, in negotiation as Guardian on behalf of the Indians with their oil lessee, itself to promulgate taxation of the lessee's share of the probable production would at once reduce the royalty he would otherwise be willing to agree to pay the Indians and would be in substance and effect for the Guardian by this means to tax the wards for its own benefit:

ONE.

I.

Taxing the lessee of restricted Indian mineral land on his share of the production is direct in its effect on the Indian lessors and to do this would be in substance to tax the Indians on their royalty.

Gillespie v. Oklahoma, 257 U. S. 501:

Braden and Gillespie sustained precisely the same relation to the Osage Tribe of Indians (lessor of one and the same oil deposits) and to the United States as the Indians' Guardian, and under substantially identical leases, and each was subjected by Collectors to the same *kind* of taxation.

Gillespie was a citizen of Oklahoma and a white man. Oklahoma laid an income tax on entire net income arising from all sources, and sought to hold her citizen Gillespie liable on income derived by him as lessee of restricted Osage Indian tribal oil lands from his sales of his share of the oil he extracted therefrom,—so far as these Indians' proprietary interests were involved, exactly our case and as petitioners put it.

Just as Braden had in hand income from oil produced by him from Osage Indian land, so had Gillespie identical sort of income as like lessee of the same tribal lessor from the same land.

The Supreme Court of Oklahoma upheld taxing Gillespie's income as such lessee.

Gillespie having taken his case to this Court, the Supreme Court of Oklahoma was reversed and it was adjudged that Gillespie was not liable to pay taxes to his own State on income derived as lessee of Osage Indian oil lands.

Obviously, this intervention between a State and her citizen was out of no regard for Gillespie but solely for the Indians' sake.

Why was it, that it made a difference to them, that a non-Indian lessee of their mineral lands had to pay taxes on his income from their lease to him?

This Court's reasoning starts with the fact that Gillespie—so also Braden—"was an instrumentality used by the United States in carrying out *duties to the Indians* that it had assumed," the question being "whether he is liable to this *kind* of tax," (italics ours), (p. 504).

The test being "the effect of the tax" (*Railroad Co. v. Peniston,* 18 Wall. 5, 36), and the question of lessee-tax-liability arising in light of the lessee being a federal instrumentality to carry out guardian duties to Indian wards, what duties in the premises did the Guardian owe these Osage wards beyond seeing that they got full value for their oil rights?

The Indians had no machinery and no ability themselves to produce their oil or to market it. The Guardian

did not want to go into the oil business. Therefore it was, and therefore only, that resort was had to Gillespie, who did have the machinery, labor, and experience to find the oil, to get it out of the ground, and to turn it into money. The Indians' only interest in the transaction was *the royalty it would produce.* In so far, then, as their lessee was pertinently "an instrumentality"—as he was—to carry out fiduciary duty, *it was as producer of Indian royalty.*

Here was the very place the Attorney General for Oklahoma (unsuccessfully) fought. At the outstart of his Brief in this Court (p. 4 thereof), he declared that Oklahoma urged the validity of that income tax on profits of a lessee of Osage tribal oil lands on the ground that taxation of the lessee on his share of the oil, "is *not* a tax upon property of the *Indian*",—the very position now advanced by the Federal Bureau of Internal Revenue in the cases at bar.

These tribal leases, however, being under the National Government's *protection* as Indian Guardian (*Indian Territory Illuminating Oil Company v. Oklahoma,* 240 U. S. 522, 529), and Gillespie an instrumentality used by the United States *to carry out its duties to the Osages,* and taxing affecting terms (*Weston v. Charleston,* 2 Pet. 449, 468, *supra*),—

> "a tax upon such profits (of the Indians' lessee from his leases) is a direct hamper" upon the Guardian's effort "to make the best terms that it can for its wards." (p. 506).

And the judgment of the Supreme Court of Oklahoma was accordingly reversed.

The Gillespie case dealt with a non-Indian operating lessee of Osage tribal oil lands and with a tax on his in-

come derived from his sale of the oil he extracted therefrom; and

The fundamental issue was whether such a tax on the Tribe's lessee was direct or remote as affecting the Tribe in respect of these same oil deposits and these Indians' royalties therefrom.

Just as with the coal (p. 14, *infra*), the real nature and effect of the tax was seen to be in respect of the negotiations for the lease (p. 506).

If the invalidity of taxing Gillespie's oil income, as Osage Indian lessee, had not been because the real effect of such taxation was directly to tax the Indians by abating the royalty otherwise obtainable for them in the negotiations for the lease, wherein—would petitioners suggest—was it germane in the Gillespie case to distinguish the *Gay case* as "obviously" more *remote,* adjudge such tax on lessee a "direct" hamper on "terms", cite *Weston v. Charleston,* or stay Oklahoma's hand on her citizen's income from his sale of the oil?

True, with Gillespie, the question arose in a case of State taxation:

But taxation, direct in effect on "terms" for Osages when imposed by a State, would be no less direct if federally imposed. To a bargaining lessee, it makes no difference *who* lays the tax. Since Oklahoma's enactment of taxation of operators' oil income injuriously affected the amount of Indian royalty, the United States' like taxing would have precisely the same inexorable economic effect.

It was not just because it was *Oklahoma* that was doing the taxing of profits of Indian mineral lessees—it was

because of what was being *done*—it was the effect on the negotiations for the Indians of this *kind* of taxation of their lessees *in the light of the obligations of the guardianship.*

In this very regard, *Gillespie v. Oklahoma* was followed in *Jaybird Mining Company v. Weir,* 271 U. S. 609, 613, 614, and 615, where, on the authority of the former and its related cases, the opposing view that payment of taxes on restricted Indian ore mined by a lessee "will not affect the financial return to the Indian under the lease" was again rejected.

How is it an answer, then, for petitioners to urge that what a State may not do touching a federal instrumentality, Congress has *power* to do? Congress' power is not in controversy, but its intention in the light of its *duty.*

At that, strictly speaking, it was *not* a matter of power in Oklahoma to tax, but of lack of federal consent to State exercise of power. *Jaybird Mining Company v. Weir,* 271 U. S. 609, 613, *supra; Childers v. Beaver,* 270 U. S. 555, 559.

In *Metcalf v. Mitchell,* 269 U. S. 514, 519, 522, (petitioners' Brief, p. 10) the effect, on the State there, of that consulting engineer's being within the purview of the federal Acts was adjudged *remote* and in *avowed contrast* to the Gillespie and related Oklahoma Indian tax cases, *supra,* whereas *ours is the Gillespie case,* except only that the taxor here is the very Guardian.

The Oklahoma Indian Coal-tax Case:

In *Missouri K. & T. Ry. Co. v. Meyer,* 204 Fed. 140, Judge Cotteral's conclusion against the validity of that Oklahoma coal-tax proved to be in accord with this Court's

conclusion with reference to the same legislation (pp. 13-14, *infra*). The attempted taxation there was on receipts from coal which a Tribe's lessee had mined from restricted Indian mineral lands. Judge Cotteral (ft. 145) held that the question as to the *directness* of that tax-on-receipts should be tested by its effect upon the Indians' leases. He pointed out that, if sustained, it might be extended to the limit of depriving the leases of all value to the Indians.

That particular tax, when it came to being *collected,* was, of course, against the pecuniary receipts of a particular lessee from his *sales* of the coal, just as Braden's (and Gillespie's, *supra*) was from sale of oil. The question of directness of bearing of coal-tax, however, was "upon the leases", upon the anterior real estate transaction of leasing (top p. 146).

This Court's consideration of the same taxation was in *Choctaw, etc., Railroad Co. v. Harrison,* 235 U. S. 292. The leases had been negotiated by the United States as the Guardian of the Choctaw and Chicasaw Indians in discharge of the *duty* owed those dependent Indians in respect to the opening and operating of their coal deposits, and provided for a rent, or royalty, for them based on the production of coal.

The federal court below there, as well as the Supreme Court of Oklahoma in *Coal Co. v. Trapp,* 38 Okla. 792, 794 —the reasoning and conclusions of both of which were rejected (235 U. S. at 298)—had viewed the tax narrowly, as though a tax on personalty, as if the incidence of the tax were on the proceeds of the coal after being mined and hence as something remote as related to the Indians. This Court, however, approving Judge Cotteral's view that that tax was not on the coal as personalty *but was against the leases and thus in reality a direct tax on the*

Indians on their royalty from their coal lands, struck the tax down with the declaration that giving a tax a particular name or using some form of words could not take away this Court's duty "to consider its real nature and effect". (nr. ft. 298 of 235 U. S.)

So also at bar, the real nature and effect of taxing the income of the Osages' oil lessees would be equally direct on the Indians, upon their oil royalties. Braden, as the Osages' lessee, is, concededly, a federal instrumentality used by the United States in carrying out the duties which as Guardian it assumed toward this dependent Tribe. Concededly, his lease is under the Guardian's protection.

By way of illustration, from among the Oklahoma Indian tax cases, *supra*—

An Indian oil-lease is being negotiated.

The Indian lessors—incapable, legally as well as practically, of dealing for themselves—take no part in the negotiations. Trusting to its protection and good faith and relying on its power, they depend wholly on their Guardian to make for them the best terms that it can with their non-Indian lessee,—peradventure, Gillespie of Oklahoma, or Braden of Sewickley.

Oklahoma interrupts by announcing intention to take in taxes part of the prospective lessee's share of any oil he may be able to produce. This, the Guardian at once vetoes as directly interfering with its duty to get the Indians full royalty, and Oklahoma withdraws defeated.

Motive, duty—instigation thereto, direct effect, on Indians' return from their mineral lands, of taxing their lessee:

II.

What, on the score of duty to its dependent Wards, the Guardian would not let Oklahoma do, it has not itself done.

The Guardian's duty has not changed. The reason constraining the fiduciary to stay Oklahoma's hand is still as compelling. Has the United States itself done as against its dependent wards what on the score of its duty to them it would not suffer Oklahoma to do? Reason for invalidating state taxation of operators' oil income because inevitably affecting Indian wards' royalty is just as potent a reason why the United States as Guardian has not turned around and *done the very same thing itself.*

As the Attorney General said, of the Gillespie and sister cases—referring to the Indians,—

> "If a state can not tax them, the question arises, is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"
>
> 34 Op. Atty. Gen. 275, 285.

Or, as the District Court said,—

> "As the exercise of taxing power by Oklahoma might destroy the value of the lands to the Indians, so, probably, the exercise of like taxing power by the Government would have such destructive effect. Braden, the decedent in this case, is not taxed, not because the United States was without power to tax him but because in the discharge of its obligation as

guardian it has refused to exercise such power to the manifest detriment of its wards." (R. 47).

It is no part of a Government's policy for its own purposes to tax its own land or its own instrumentalities. 37 Cyc. 865; *Mercantile Bank v. New York,* 121 U. S. 138, 162. Here, the land is held *in trust.* The lessee's utility as instrumentality is *in carrying out a fiduciary duty.* His lease is under the Government's protection, the United States in the negotiation thereof being under obligation to take care of its lessor wards (257 U. S. 501; 240 U. S. 522, *supra.*)

Were there doubt, as it seems to us there can be none, the Guardian would resolve it against itself. This trust is a public use in the highest sense, *U. S. v. Nashville etc. Ry. Co.,* 118 U. S. 120, 126.

As said in *Choate v. Trapp,* 224 U. S. 665, 675,—

"The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the Nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied *in tax cases.*" (p. 675). (Italics ours).

Without break, the decisions attribute to the United States the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *United States v. Candelaria,* 271 U. S. 432, 439.

III.

On principle and in practice, a tax-free lessee pays more rent.

1.

Taxing—as said by Chief Justice Marshall in *Weston v. Charleston,* 2 Pet. 449, 468,—"must" affect "terms."

Under the Texas Constitution taxation of school lands is forbidden. Accordingly it was held that to tax lessees thereof "would but diminish the rental value of such lands", such that it was not reasonable to suppose this was intended. *Daugherty v. Thompson,* 71 Texas 192, 202.

All lands, houses, or revenues of Harvard College not exceeding five hundred pounds per annum being free from taxation, they were equally so in the hands of its lessee. *Hardy v. Waltham,* 7 Pick. 108.

When landlords get the tenant to agree to pay the taxes, while they find this convenient, they are under no delusion that the tenant is *really* paying the taxes:

"The reasoning is simple", as Seligman says. "At any given time, when the tenant makes out his lease, he makes allowance for the taxes which are collected from him. The rent which he is willing to give will vary with the tax which he is compelled to pay. * * * *The burden hence falls wholly on the landlord."* (Italics ours). *Shifting and Incidence of Taxation,* 3 Ed., 271, 272.

As to the negotiation of leases of minerals, such as *oil,*—

2.

The essential problem between prospective lessor and lessee is as to the *division* of the hoped-for production.

While the presence of oil and the possibility of striking it give value to land far beyond any agricultural or surface value, the owner does not ordinarily have the means to finance the operation. Even on proven ground, the venture is speculative, and costly. In practice, accordingly, the situation is dealt with on the footing of a lease of the land with a rent, or royalty, based on a *sharing* of the production.

Anything which increases the hazard or expense to the operator makes him the less desirous of entering upon the enterprise. A tax against his prospective profits could be made heavy enough to deter him from making a lease at all.

Thus, as matter of common knowledge, as well as of authoritative pronouncement, the principle that a tax on lessee is shifted to lessor by being taken out of the latter's rent in advance is *a fortiori* true in leasing land for oil.

If, then, during the negotiations to lease Indian oil lands, a governmental authority announce an intention to take in taxes a share of the still prospective production for *itself*—in addition to the share for the Indians—it at once reduces what the lessee could otherwise agree to render the Tribe.

As said in *Gillespie v. Oklahoma* (*supra,* p. 10), stopping short of theoretical possibilities, the hamper of such a tax is "direct", and *that,* in its economic effect as to "terms"; and

In oil-lease negotiations, "terms" for landlord is *royalty.*

3.

Actual Alaskan and Osage Indian Royalties:

How highly "practical" it is for Indians to have a tax-free lessee, is seen in the case of Alaskan Indians. In the negotiations on their behalf, the Secretary of the Interior obtained an *agreement,* that if the lessee were adjudged not subject to that territorial license tax, it "should pay an amount *equal to the tax* to the lessor"! *Territory v. Annette Island Packing Company,* 6 Alaska 585, 589.

Neither, is it, as petitioners argue now, (their Brief, p. 9), "altogether theoretical and not practical" in the case of the *Osages.* These Indians do receive greater royalty because of the non-taxing of their lessees of their mineral lands, *their leases paying a much higher return* for more limited rights than the ordinary commercial lease in the same (mid-continent) field (p. 4 *supra*; R. 6), just as the authorities envisage.

Attention is invited to the striking comparison between the terms of the Osages' lease and those of the commercial lease as tabulated in parallel columns at pp. 6 and 7 of the Record. For the high Osage royalty (of from 33⅓% to more than 50% excess over the commercial lease) no reason save tax freedom of the lessee has ever been suggested or is apparent. While the Secretary "prescribes" and "approves" it, this high royalty did not drop from the clouds, it is the fruit of untaxed experience. Nor is it to

be forgotten that it is not enough for the Secretary to "prescribe", he has to get his lease *signed.**

The high royalty, then, as well as Braden's protest to the Collectors against payment of taxes on his income as Osage oil lessee (R. 43) and his own personal filing of claim for refund against Lewellyn (pp. 4, 5, 6, *supra*), equally confute petitioners' irrelevant supposition as to what Braden *thought,* when negotiating, as to income tax liability, or the circumstance that under Treasury requirement this income was included in his returns,—even were the question—as, of course, it is not—one as to the mental attitude of a particular lessee instead of the meaning of Acts of Congress as related to federal negotiation of any mineral lease of dependent Indians to any lessee of theirs.

In the cases at bar, then, the courts below were actuated not only by *a priori* considerations but also by *stare decisis.* It is submitted, they were right, that the principle that so justly ruled the Choctaw and Gillespie cases rules ours.

Petitioners content themselves with the familiar assertion that "This tax is not on the Indians, their property, or income. It is on the income of those dealing with the Indians." (Petitioners' Brief, p. 9):

Petitioners confound the collection of the tax with its incidence.

The argument did not prevail in the Choctaw, Gillespie, or Jaybird cases. Wherein do petitioners suggest that

---

**In the Stipulations,* petitioners insisted the facts herein were "immaterial" (R. tp. p. 17). They are averred,—and not denied, in Affidavit of Defense or Stipulation.

the argument is any sounder now? Taxing the Indians' lessee on the coal and oil and ore taxed the Indian before. Why not still? Petitioners suggest no answer. We know of none. The proposition, it seems to us, is both patently sound and *stare decisis*.

It may perhaps be remarked, that, to the foregoing and to all the authorities above cited, petitioners' attention has been already repeatedly invited both in this Court and in the courts below.

To tax prospective oil lessee being thus in reality to tax Indian lessor, it is submitted that the courts below were also right (R. 46, 47; 51), that, by these general Revenue Acts,—

IV.

Congress has not taxed the Wards for the benefit of the Guardian.

Absence of intent by the National Government for its own benefit in anywise to tax the members of the Osage Tribe of Indians on their mineral deposits arises, it is submitted,—

(a) from the fiduciary obligations growing out of the relationship of Guardian to ward assumed by the United States toward a dependent *people* in respect of the wards' trust estate; (b) from these, the Osages' *specially* restricted tribal mineral deposits being, admittedly, "inalienable in any form" and under Guardian protection against alienation in all forms (R. 4); and (c) from the Government's long and unbroken policy not to tax its Indian wards; and

(d) is manifested in the Revenue Acts from their being *general* statutes without mention of Indian wards or trust estate, Acts whose *purview* therefore does not embrace members of a Tribe in respect of their *specially* restricted lands:

1.

The Osage Tribe is a Nation, *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, a people, *Choate v. Trapp,* 224 U. S. 665, 675.

This Osage Nation, the United States received "under their protection," the Osages acknowledging dependency, 2 *Kappler's Laws & Treaties* (2 Ed.), pp. 97, 880; R. ft. 3,—the Government assuming the duty to protect the Tribe's mineral deposits and holding them in trust (R. 4).

As said by Chief Justice Marshall in 5 Pet. 1, 17, *supra,*—

> The Indians are wards and *depend* on the Guardian, "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."

From this accepted dependency, the guardianship arises. *Winton v. Amos,* 255 U. S. 373, 392.

The Osages are still wards. *La Motte v. United States,* 254 U. S. 570, 575; *United States v. Ramsey,* 271 U. S. 467, 469; R. 3, 4.

2.

How pertinent the Attorney General's reasoning:

On Mar. 20, 1925, at the request of the Secretary of the Interior, the Attorney General examined the question whether, during the restricted period, income of individual *Quapaw* Indians from their mineral royalties (*inter alia*) from their restricted lands had been taxed by these same general Revenue Acts. In an opinion, approved Sep. 15, 1925, by the Secretary of the Treasury, the Attorney General held that—*no reference being made therein to Indian wards or their property*—such income is not *within the purview* of the Acts,—this because of the fiduciary relationship of the Government toward the Indians, as well as by reason of the "inalienability" of their lands from which their income came.

As in the case of the Osages, there was nothing in the treaties or Acts of Congress with respect to the Quapaws in so many words saying that Quapaw mineral lands should be free from taxation. There, as here, the word used was "inalienability". (R. 4, 16, 46.)

The Attorney General—in view of the Government's policy toward the Indians as a dependent people, their being the original proprietors of the land, the fiduciary relationship, and the principle of construction that Indians are favored—said,—

> "True, the Federal Income Tax Statutes are in broad compass and impose a tax upon the entire net income of 'every individual.' Section 1 (a), Revenue Act of 1916, 39 Stat. 756; Section 210, Revenue Act of 1918, 40 Stat. 1057; Section 210, Revenue Act of 1921, 42 Stat. 227; Section 210, Revenue Act of 1924, 43 Stat. 253. *No specific reference, however, is made in*

these Acts to Indians and their property. We have seen that none of the treaties or statutes dealing with the Quapaw Indians contains any provision subjecting their lands to State or Federal taxation. On the contrary, by the Quapaw Allotment Act Congress, instead of providing a way to compel the Indians to contribute out of their property to the support of the Federal Government, immediately concerned itself with a provision of law securing to them the continued possession and enjoyment of their lands by making the same inalienable. In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability* should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, *by implication,* to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rest largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, *it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*

"Therefore, in the absence of clear congressional authority to that effect, I am of opinion that the income from the restricted lands of the Quapaw Indians is *not subject* to the Federal Income Tax Laws.

"The opinion of the Attorney General of March 15, 1924, relative to the taxability of the Five Civilized Tribes, is largely applicable to the question here presented." (Italics ours.) 34 Op. Atty. Gen. 439, 445.

"Quapaw" in the above quotation could just as well

read "Osage," save that the Quapaw restricted period expired in 1921, Osage still running till 1946 (R. 5).

That alienation may be involuntary, and that Indian inalienability connotes Indian freedom from taxation, is well established. *Kansas Indians,* 5 Wall. 737, 760; *United States v. Bean,* (Judge Sanborn C. C. A. 8th Cir.), 253 Fed. 1; 19 Op. Atty. Gen. 161, 168, and authorities there cited. Judge Cotteral so views these very minerals, 193 Fed. nr. tp. p. 492. The legal title thereto is in the United States. *McCurdy v. United States,* 264 U. S. 484, 486.

Equally sound is the Attorney General's reasoning that, Congress not taxing its wards on their restricted land, neither has it taxed the wards on their rentals therefrom. *Pollock v. Trust Company,* 157 U. S. 429; and 158 U. S. 601, 618; *Gillespie v. Oklahoma,* 257 U. S. 501, at 505; and *Oahu Ry. & Land Co. v. Pratt,* 14 Hawaii 126, 129.

Oil in place is, of course, land. *Marshall v. Mellon,* 179 Pa. 371, 374; and Indian "restrictions" are impersonal, they run with the land which it is the Government's duty to preserve against alienation. *Bowling v. United States,* 233 U. S. 528, 535; *United States v. Moore,* (C. C. A., 8th Cir.), 284 Fed. 86, 90.

Likewise, on Jun. 24, 1926, the Attorney General advised that an intent to tax the income of the members of the Hopi Tribe "can not be assumed from the general provisions of the internal revenue laws, although broad in compass", that individual Indians maintaining their tribal connections do not come *"within the purview* of the Federal revenue Acts".

It is *not* "exemption", it is "purview"!

Recurring to the prior opinions concerning the federal policy toward Indian wards in the matter of taxation, and how the "Indians have always been the subject of *special* legislation"—just as with the Osages (R. 3 to 5)—"and that *general* legislation, *and especially revenue laws,* which burden and restrict the use and enjoyment of property, should not be applied to Indian wards unless Congress clearly so directs",—the Attorney General said of the Acts in question:

> "The principles announced in these opinions are especially applicable to the Indians here involved. *These Indians are yet wards of the Nation,* in a condition of pupilage or dependency from which they have not been discharged. The *legal* title to the lands they occupy rests not in them, either individually or as a tribe, but *in the United States.* Appropriations are annually made for the protection, welfare, education, and civic advancement of these dependent people. * * * *To tax them is so inconsistent* with the purpose and object of the Government in its dealings with these Indians, and *the relation that it maintains toward them and their property,* that it can not be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress." (Italics ours.)
>
> 35 Op. Atty. Gen. 107, 108, 109.

3.

As to the matter of statutory *form,* as expressive of Congressional intent,—

With respect to any subject, Congress, having deliberately dealt with it *specially,* is presumed not to call it to mind in a later *general* Act where not expressly mentioned. *Rodgers v. United States,* 185 U. S. 83, 87, 88 and 89.

Indian status is peculiarly within the foregoing principle. And "generality" of terms of the present Revenue Acts, as to income of "every individual" from "any source", is not one whit more sweeping than in the statutes in the following two cases, which, even though there "literally" embracing Indians, were adjudged not to be *meant* to include them:

In *Washington v. Miller,* 235 U. S. 422, 427, Congress, having dealt specially in and by two certain provisos with respect to the Creek Nation, enacted a general law that "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace *all* persons and estates in said Territory, whether *Indian,* freedmen, or otherwise, * * *".

This Court nevertheless held the special Acts unaffected, and said,—

> "No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, *if taken literally,* it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, *for it made no mention of that law or of those lands.* In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks." (Italics ours).

In *Frost v. Wenie,* 157 U. S. 46, 58, and 59, this Court had to do with a special Act protecting Osage trust and reserve lands in a certain reservation. Though the *words* of a later general Act, *literally,* embraced *all* lands in the reservation, the correct interpretation was,

that "Congress did not intend" by the later general Act to prescribe for the Osage trust lands within "all the lands"—that the correct interpretation of the general Act left "untouched the prior act as expressing the will of Congress in respect of the Osage trust and diminished reserve lands."

The opposing view, that by a general Revenue Act a tax on "every individual" reaches the members of an Indian Nation on their rentals from their specially immune land, also assumes an intention to depart from an unbroken policy to the contrary running back to the foundation of the Government and disregards settled rules of interpretation.

The United States never having for its own benefit in anywise taxed its Indian wards, any purpose now to make a radical departure "is not lightly to be inferred". *United States v. Nice,* 241 U. S. 591, 599.

Statutes levying taxes are construed (a) in favor of the Indians and (b) against the Government and (c) are not extended by implication. *United States v. Payne,* 264 U. S. 446; *Choate v. Trapp,* 224 U. S. 665, 675, *supra; United States v. Field,* 255 U. S. 257, 262; *Gould v. Gould,* 245 U. S. 151, 153.

Not only on principle and authority is intent to tax its wards in anywise not to be imputed to Congress by implication from general Acts, but—since the filing of the petition,—

V.

It has been conceded by the Government that Congress has not taxed the Osages on their oil royalties.

In the (unreported) case of *Pearson v. Alexander, Collector* (3356 Law, United States District Court, Western District of Oklahoma), Judge Cotteral, on Feb. 2, 1927, entered a final judgment in favor of October Pearson, an individual member of the Osage Tribe, adjudging that he had been erroneously taxed under the federal Revenue Acts "on his distributive share of the funds accruing during that year (1918) to the Osage Tribe of Indians from oil and gas mineral leases belonging to said tribe." (Pearson's petition, demurred to).

The time for review expired May 2, 1927, without step to that end, the Solicitor General declining to authorize an application for a writ of error, the case presenting the same question as dealt with by the Attorney General in his opinion *supra* relating to taxation of income of the Quapaw Indians.

Thus the Government now concedes that Congress has *not* by these Revenue Acts taxed its Osage wards on their income from these oil deposits *in their hands*—it being perceived that the duty owed the Indians precludes imputing to Congress any intent to take in federal taxes a part of the Indians' share of the oil *after* it reaches them,—and this without any "exemption" in the Acts.

The compelling reason—for the concession—that the Government has not, in general Acts that do not mention them, taxed a dependent people who are its wards upon their oil income in their hands is equally compelling that

Congress by these Acts has not taxed its wards thereon *at all.*

To take the tax out of the Osages' income in advance, *before* it reaches them, by reducing their royalty in the negotiations for the lease through taxation of their lessee, would be just as much taxing them. Indeed, from the very uncertainty to a bargaining lessee of the consequences of taxation of *prospective* profits from his share of an uncertain producton in a hazardous enterprise, the Government might well be taking more from the Indians by that method of taxation.

To say that Congress has not taxed its wards but has taxed their lessees, is to embrace form for substance, is not to look below the surface. When one faces "real nature and effect" and deals with the realities,—then to tax operator *is* to tax Indian. It is the same thing in another way.

What the Bureau of Internal Revenue really seeks, as touching Indian minerals, is to get the United States to shut its eyes to the facts so as thereby to effect a departure from that most just Indian policy to which the Government has for over one hundred and twenty-five years scrupulously adhered.

TWO.

The Government's mode of approach to the one and only question in this case appears to us to obscure it,—

(a) It is no mere matter of lessee-income from subsequent sale of oil (thought of as extracted and transmuted into *personalty*) being exempt under the

Acts, but of the effect on the *Indians'* income of announcing the taxation of their lessee before the lease is ever signed and while the oil is still down in the ground;

(b) Neither is there any question about an "exemption" in the Acts or of reading one into them. The correct view, and only claim, is, that Indian wards and their specially restricted property are *wholly outside the purview* of their Guardian's general tax Acts; and that, because of the inevitable effect upon the Indians' revenue of taxing their lessee, the income of the latter derived by contract with them is for like reason outside the law; and

(c) As has been seen, so far as this *particular* lessee is concerned (whom the Government's Brief so irrelevantly stresses), he made due objection from the outstart, returned the income on Government demand, paid under protest, and duly claimed refund, his Osage lessor receiving from him the high, unabated royalty;

Braden's "ignorance of his legal rights" (Government's Brief p. 9) had nothing whatever to do with his liability to pay, or the Treasury's right to assess and collect, the taxes. The right referred to is Braden's *right to refuse to include in his return* what the Treasury was "erroneously" requiring to be "included" (R. 10). Braden's "ignorance" was of this right, to refuse the return thus demanded of him, and it is in this connection that his Executor, after Braden's death, makes the averment (R. 13) which the Government cites. That this is the executor's meaning, is seen from the context and from Braden's denials of liability to tax duly averred.

Turning to the details of the Government's Brief,—

VI.

The interpretation of the Acts is not to be changed because of a particular lease having been signed.

Driven by the decisions and the opinions of the Attorneys General, petitioners not only concede that the Indians have *not* been taxed on their income from their restricted mineral lands, but, *sub silentio,* that the effect of the interpretation of the Revenue Acts sought by the Bureau of Internal Revenue would be to tax the Indians on all royalty they would *hereafter* get on their oil and gas and coal and ore, but in their Brief petitioners in effect argue—and in spite of this particular operator's having in fact made no deduction for taxes—yet that, Braden having once bound himself, no *subsequent taking* of taxes from him could abate the royalty of his covenant to pay by their *now* being shifted to the Tribe. But,—the answer, of course, is,—

(a)

These cases concern, not the obligation of a lease, but the scope of legislation.

It is not how a contract, once entered into, binds, but what the Congress, in relation to any lessee of dependent Indians, meant by its Acts.

They are the same Acts,—the scope for tomorrow was the scope from 1916 on; and

(b)

Neither is it a matter of *taking* taxes after a contract of lease has been signed, but of their promulgation during its negotiation:

Gillespie had made *his* contract, was bound when demand for taxes was made of him—like Braden had in hand income from his share of oil extracted as lessee of the Osages.

The "direct hamper" is before signing, is on effort to make "terms", and, of course, is in respect of the negotiations with *any* lessee.

VII.

There is no attempt here to read an exemption into the Revenue Acts. The question is one of scope of intent with reference to Indian wards.

In their opinions, neither Attorneys General nor courts below have read any exemption into the Revenue Acts:

They alike hold that the members of a dependent Tribe and their specially restricted property are in nowise within the *purview* of general tax Acts, are outside Congress' intent to tax—a very different thing from generality of statutory terms including a subject and its then being by an exemption taken out of their operation.

The issue is not and never was one of searching in the Acts for an exemption or of implying one into them. No such claim is made, or ever was made. The inquiry has always been whether Congress has enacted that certain income is *taxed,* not whether it has "exempted" it.

In spite, then, of the discussion permeating petitioners' Brief,—

> No one has read an exemption into the statutes. Were no exemptions enumerated therein at all, the proposition would be the same.
>
> This Tribe and its restricted property, already specially "exempt", Congress did not in anywise mean to *include*.

Bank v. Tennessee, 161 U. S. 134, 135, 145, and 146, (Petitioners' Brief, p. 11) was a case of interpreting an express provision of a State bank's charter exempting its capital stock from taxation. The State later taxed surplus. The bank's claim that the exemption also embraced surplus was rejected because the terms of the exemption did not plainly include surplus. At bar, there is no exemption to construe.

Moreover, by not appealing the Pearson case and by adopting the Quapaw and Hopi opinions, the Government concedes that the question is *not* one of an "exemption." These Acts contain no exemption in favor of the Indians, nor mention them, yet it is conceded *they* are not taxed. Hence, confessedly, "exemption" is not in this case. *Braden's* freedom is because he is the Osages' lessee.

Restating the problem, it is fundamentally the *Indians'* income that is "exempt"—to adopt Bureau terminology—and, at that, specially, and by treaties (R. 3, 4)—such that the burden is on the Government, it seems to us, to point out wherein Congress has in any manner taxed them; and, in consequence thereof, the income of the Indians' lessee in the premises Congress *has not taxed*. In that sense, the latter's income might be characterized as exempt, but that does not mean that anybody has found an exemption in the Acts or implied one into them.

As "exempt" means both "not subject to" and "excepted from the operation of", using "exempt" and "exempted" leads merely to confusion of thought. Notably enough, petitioners, when not treating of the lessee, use different terminology.

VIII.

The importance of the case to the Government is not denied, although the amount of other possible refunds is germane neither to the question of the Revenue Bureau's authority to collect such taxes nor the Treasury's right to retain them, not to mention the Bureau's having exacted the taxes against the advice and decisions *supra*.

Petitioners' suggestion, that Congress' reenactments of the law reflect the opinion of the Treasury, wholly forgets about the Attorney General. While Congress was engaged in its reenactments and the Treasury was forcing the Indians to pay, the Attorney General was advising that under the Acts the Indians had not been taxed. *Now* the Treasury confesses that the Attorney General was right.

In this matter, then, of insight into the mind of the legislature, which Department—do petitioners suggest—Congress in its reenactments was following?

The true view it seems to us is that, Indian wards and their specially restricted estate being outside the field of general taxation, there was no occasion for Congress ever in anywise to mention or deal with them in general tax Acts.

The case, therefore, comes down to this: Congress concededly not having taxed its Indian wards,—in all reality, is it not the same thing as taxing them to tax their min-

eral lessee? Is there anything better settled or better known than the doctrine of the incidence and shifting of taxation from lessee to landlord? Virtually petitioners' whole argument consists in persistently ignoring these basic things, as well as in ignoring the essential difference between a subject's being outside an Act's scope and an exemption from the operation of its terms.

As to the suggestion that the Bureau for years has been taxing the Indians' mineral lessees—and *the Indians also,* now confessedly illegally as to the Indians themselves—we beg to point out that our case dragged for years in the Treasury and from a date long before Braden died and that these suits were promptly brought after the Bureau was got to act. Till refund is denied, one can not sue.

As, then, solicitude was not for Gillespie, but was for Indians, so it is a matter here of the consequences to them of the interpretation urged by petitioners. On principle and the sole underlying reason in the Gillespie and related cases, the direct effect of promulgating taxation of the operators would be to lessen the income that can be negotiated for Indian coal, ore, gas, and oil. Since, then, the Guardian in its general tax Acts has not for its own benefit imposed a tax upon its wards—concededly has not—it has not wrought the same result by taxing their mineral lessees. Congress could not by mere implication from general Acts have meant to do so.

It is submitted,—

That the questions presented by the pleadings have been correctly and justly decided and that the judgments should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
R. C. ALLEN,
C. A. JONES,
M. W. ACHESON, JR.,
Attorneys for Respondent.

Of Counsel:
JAMES R. STERRETT,
I. J. UNDERWOOD.

[redacted]

TABLE OF CASES.

PAGE

Cherokee Nation *v.* Georgia, 5 Peters 1 ..... 2, 3, 4, 22
Church of the Holy Trinity *v.* United States, 143 U. S. 457 9
Choate *v.* Trapp, 224 U. S. 665, 675 ..... 16, 20, 21
Central of Georgia Ry. Co. *v.* Wright, 248 U. S. 525, 527 20

Dick *v.* United States, 208 U. S. 340 2

Elk *v.* Wilkins, 112 U. S. 95 ..... 3, 17

Fink *v.* Commissioners, 248 U. S. 399 ..... 20, 21

Gillespie *v.* Oklahoma, 257 U. S. 501..... 6, 12, 13, 14 16, 18, 22
Gould *v.* Gould, 245, U. S. 151, 153 21

In re: Sah-quah, 31 Fed. 329 ..... 3, 4

Jackson *v.* Goodell, 20 Johna, 193 4
Jaybird Mining Co. *v.* Weir, 271 U. S. 609 13

Kappler's Laws and Treaties, Vol. 2, p. 95... 23, 24, 25

McCullough *v.* Maryland 11

Thomas *v.* Gay, 169 U. S. 264 16

United States *v.* Barnady, 31 Fed. 20 3
United States *v.* Delaware & Hudson Company, (213 U. S. 366) 10
United States *v.* Holliday, 70 U. S. 418 2
United States *v.* Kagama, 118 U. S. 375 2
United States *v.* Kirby, 7 Wallace, 482 8
United States *v.* Lariviere, 93 U. S. 192 ..... 2, 3
United States *v.* Rickert, 188 U. S. 432 2

Washington *v.* Miller, 235 U. S. 422, 428 17
Worcester *v.* Georgia, 6 Peters, 515 ..... 2, 3
Wright *v.* Central of Georgia Ry. Co., 236 U. S. 674, 679, 680 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1927.

Nos. 219-220.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pensylvania,

Petitioner,

vs.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, deceased,

---

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania,

Petitioner,

vs.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, deceased,

---

Brief of James M. Beck and T. J. Leahy as *Amici Curiae* in Behalf of the Osage Indian Tribe.

A brief as *amicus curiae,* filed by the courtesy of the Court and the parties to the record, need not and should not make a fresh recital of the facts. The *amicus curiae* need only submit such special considerations and additional reasons, as may possibly aid the Court in its consideration of the case.

I.

There is a special reason for such a brief in this case, for the Osage Indian Tribe, whom we represent, have a very direct and substantial interest in its decision. To determine the question without reference to its rights would be to produce the tragedy of "Hamlet" without Hamlet. As hereafter explained, the burden of such a tax, as applied to the share of royalties of an operating lessee, would inevitably lessen the value of the lands to the Indian Tribe. Every one knows that a tax exempt security sells to better advantage in the market than a taxable security. It is for this reason that nearly twenty billions of dollars are invested in tax free securities, which yield a low rate of interest. This is equally true of the leases under consideration. Who can seriously question that the Indian Tribe can secure a greater value for their property, if they can dispose of its mineral wealth free from any burden of taxation, direct or indirect?

The Constitution of the United States regards Indian tribes as a distinct entity. It provides that *"Congress shall have power to regulate commerce between the states, with foreign nations, and Indian tribes."*

These tribes have been repeatedly held by various decisions of this Court to be a semi-dependent political body, with certain rights to govern themselves, and to control their internal affairs, unless the same is taken away from them by Acts of Congress or by treaty.

Cherokee Nation v. *Georgia,* 5 Peters 1;
Worcester v. *Georgia,* 6 Peters 515;
United States v. *Kagama,* 118 U. S. 375;
United States v. *Rickert,* 188 U. S. 432;
United States v. *Holliday,* 70 U. S. 418;
Dick v. *United States,* 208 U. S. 340;
United States v. *Lariviere,* 93 U. S. 192;

Elk v. *Wilkins,* 112 U. S. 95;
In re: *Sah-quah,* 31 Fed. 329;
United States v. *Barnady,* 31 Fed. 20.

In *Cherokee Nation* v. *Georgia, supra,* Chief Justice Marshall, referring to the clause in the Constitution giving Congress power to regulate commerce with the Indian tribes, said:

> "In this clause they are as clearly contra-distinguished by a name appropriate to themselves from foreign nations as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption."

In the case of *United States* v. *Lariviere, supra,* the court said:

> "From the commencement of the Government the United States has negotiated with the Indians in their tribal condition as nations; dependent, it is true, but still capable of making treaties, and this was only following the practice of Great Britain before the Revolution. In *Worcester* v. *Georgia, supra,* the court said: The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having such definite and well understood meaning. We have

> applied them to the Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In re Sah-quah, the court used the following language:

> "From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their respective tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts, and the manner of their enforcement, marriage, descents, and the punishments for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection of the whites adjacent to them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16, 17; *Jackson* v. *Goodell,* 20 Johns, 193."

The details of the treaty relations between the United States and the Osage Tribe are fully stated in an appendix to his brief (*Post* p. 23).

II.

By these various treaties, the Osages without any substantial consideration other than the guaranty of the United States to protect the tribe, ceded vast tracts of land to the United States, comprising the greater part of the States of Missouri and Arkansas, a large part of Kansas, and a considerable portion of Oklahoma.

The United States can not now justly violate its trust obligation to this tribe. If the amount, which is

involved in this controversy be large (as suggested by the Solicitor General), the greater the injustice to the wards of the United States.

It is not questioned that if the Osage Indian Tribe had itself extracted the oil from the lands, or if the United States, as its trustee, had itself done so for the benefit of the Indians, that the United States would not diminish such property by taxation, and this notwithstanding general and sweeping expressions in the taxing statutes.

It seems equally indisputable that the United States, in pursuing this just and humane policy, never intended to do by indirection what it has consistently refrained from doing in terms.

It is equally clear, as a premise to the argument, that, if the United States as such trustee leased the lands in question for the extraction of that portion of the land which gave it its chief value, and which was subject to early exhaustion, any tax that might be imposed upon the lessee, in respect to his share of the profits would of necessity fall upon the owners of the land.

If the tax in question had been an infinitesimal one, it might be argued that this diminution of the lessee's share of the profits was too negligible to be a factor in the negotiations for the lease, but the Court will not forget that, due to the exigencies of a great war, the taxing statutes in question were burdensome almost to the point of confiscation. The taxes in question were both excess profit taxes and income taxes. In one of the taxing statutes in question the maximum surcharge on large incomes amounted to 70%. The excess profit taxes were correspondingly heavy.

It is, therefore, clear beyond controversy that the Osage Indian Tribe and the Interior Department could

make a better bargain for the Indians and obtain for them a much larger return for their property, if the royalties, which would accrue to the lessee, were not subject to diminution by taxation, for the more that the Government took, the less the lessee would give, and, as a result, the less the Government exacted, the more the Indians would receive.

Therefore, it is clear that it is the Indian Tribe, which must, in the last analysis, pay the taxes, and the only question in controversy is whether the Government intended to disregard its sacred duty to the tribe by abandoning its just and humane policy of non-taxation of Indian trust funds, simply because a portion of the proceeds was payable to the instrumentality, which the Government employed to extract the oil.

III.

Any argument on this point seems a superfluity, for this Court, as will be hereafter argued, in the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, clearly recognized that to burden a non-Indian lessee of Indian Tribal lands by a tax on his share of the royalties was to burden the owners of the land, and to "hamper" (such is the language of this Court) the Federal Government, as the trustee of the Indians, in the fulfillment of its trust to obtain the best terms for its wards. But how would it "hamper"? Not in the *power* to make such a lease, but clearly in the *ability*, if such a tax were imposed, to get the best results for the Indians and the full return for their property. Such was the clear meaning of the language of this Court.

To this argument the only reply of the Government is the very general language of the taxing statutes that "every individual" should pay the tax, excepting only those who are expressly excepted in the Act, and it

must be admitted that the statutes contain no express exception in behalf of the lessees of Indian property.

The inconsistency of this argument lies in the fact that the statutes contain no express exception in favor of the Indian owners, and yet the Government concedes that while "every individual" literally comprises the Indian inhabitants, yet such Indians are implied exceptions. Neither does it include the tribe which is the owner of the property, from which the income in question is derived.

An argument based upon such a general expression, especially in a taxing statute, is not likely to disturb this Court, for it has often recognized that it is impracticable in statutes to include in express language all of the exceptions. Language is at best an imperfect medium of thought. It generally suggests rather than defines, and it would be quite impracticable, without undue prolixity, for statutes to qualify general expressions by all of the exceptions, which may be fairly implied by reason of the Constitution, the recognized policies of the Nation and the provisions of other statutes.

In the practical administration of Government, the law making body must, and always does, assume that the judiciary will carry out the intent of the law-making body by such a reasonable interpretation as will take into account not merely the letter of the statute, but the scope of our Government, its existing and recognized policies, the purview of the statute, and the relationship of this statute to other statutes.

The judiciary, on the one hand, may reasonably assume that the Legislature did not contemplate any result which is either unreasonable, unjust or oppressive, or in marked conflict with its established policies, and upon the other hand, the Legislature may equally assume that the judiciary will construe language,

often necessarily general and sometimes vague, in a reasonable manner and in harmony with the character of our Government and its recognized policies.

IV.

"Every individual" is broad enough to include the officials and instrumentalities of the States, but the judiciary may well assume that Congress never intended to extend the statute to objects beyond its constitutional power, and again, if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (Section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punished all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *U. S.* v. *Kirby,* 7 Wallace, 482, to exemplify the rule that,—

> "*The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consquence. It will always*

> *therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."*

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of The Holy Trinity* v. *United States*, 143 U. S., 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services *of any kind* in the United States."

The question arose whether the migration under contract to this country of a clergyman to serve as pastor of Holy Trinity Church of New York City was a violation of this law. According to the literal signification of words, he was clearly within the provisions "to perform labor or services *of any kind* in the United States," and yet the Supreme Court held that the statute construed in the light of its manifest purposes did not apply to other than manual toilers. Mr. JUSTICE BREWER said:

> "*It must be conceded that the act of the corporation is within the letter of this section,* for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and services both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind," and further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we

> cannot think Congress intended to denounce with penalties a transaction like that in the present case. *It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intentions of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the Judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case.*"

A notable and more recent illustration of this principle was the case of *United States* v. *Delaware & Hudson Company* (213 U. S. 366).

In that case the Commodity Clause of the Hepburn Law made it unlawful for a railroad to transport any commodity "manufactured, mined, or procured by it, or under its authority, *or* which it may own in whole, *or* in part, *or* in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Literally the Act, with its disjunctive provisions, provided that a railroad could not transport any commodity, which it had manufactured, mined or produced, even though at the time of transportation it had ceased to have any interest in it. The question was whether the Act applied to coal, which had been mined by a railroad but sold by it before it had entered into transportation.

This Court, in an opinion by Chief Justice White, disregarded the literal force of the sweeping language of the Commodity Clause in order to harmonize it with the general policy of this and other statutes, which regulate interstate commerce, and also to avoid the decision of a grave constitutional question, to which the literal interpretation would have given rise.

But why elaborate the point? The books are full of cases where the literal meaning of statutory language is disregarded by reading into the statute exceptions, which the Court knows as matter of common sense the legislature intended. Such a rule of interpretation, without which the administration of justice would lead to the most absurd and oppressive results, has its classic illustration in the interpretation of the Constitution itself, for no language is more sweeping than the power given to the United States to tax, and such language, as in this case, is strengthened by its own express exceptions. When, therefore, this clause first came to be expounded, it might have seemed plausible to argue that, as the Constitution itself made its own exceptions, and otherwise seemingly gave an unlimited power to tax without reservation or qualification, no other exception could be made by implication.

The sound common sense and far sighted vision of Chief Justice Marshall swept away this narrow reasoning in *McCullough* v. *Maryland*, and the instrumentalities of the States were made, by judicial construction, exceptions to the Federal power of taxation in order to bring that sweeping power into harmony with the whole purpose of the Constitution. That was a far greater implication than the contention in this case, which simply argues that the general language of a taxing statute shall not be construed to apply to a situation which is manifestly beyond the purview of the statute, and which, if applied literally, would conflict

with the historic policy of the Nation to preserve, and not to diminish, directly or indirectly, the property of the Indians.

V.

But why extend the argument when this Court has in principle decided the question in the matter of the Osage Tribal lands? Even if the main issue in *Gillespie* v. *Oklahoma* raised a different question of constitutional power, yet the underlying question was whether a tax upon a non-Indian lessee of Indian oil lands was or was not a burden upon the property of the Indians. This Court reached the conclusion that it was such a burden and therefore invalid. If it had not burdened the property of the Indians and "hampered" the Federal Government in the performance of its duties as trustee, the State of Oklahoma would have had full power to tax property within its territory.

To invalidate the State statute, it was first necessary to assume that the State tax was a burden upon the lease and would necessarily affect its terms to the prejudice of the Indians, and would "hamper" the United States as trustee in preventing it from getting the best terms for its Indian wards.

We shall argue that every contention now urged by the Government to the contrary was equally urged in the *Gillespie* case and, after due consideration, negatived by this Court. Unless, therefore, this Court is prepared to abandon its reasoning in the *Gillespie* case and to destroy the foundation upon which that decision was rested, it must equally hold—even though the question of Governmental *power* is not at issue—that the United States did not intend, by a general taxing statute, to diminish for its own benefit, the property of its wards.

It has been held that the language of the income tax laws, notwithstanding the broad terms used, does not include within its scope taxes on the restricted tribal lands of the Indians or the income thereof derived by the Indians. (Opinions of Atty Gen., Vol. 34, pp. 272, 439; Vol. 35, p. 107).

It is further conceded, as we understand it and as is settled by the decisions of this Court, that such tribal lands of the Indians are exempt from state taxation, and this rule has been extended to a lessee of such lands under authority of the Government, and thus carries with it an exemption of the income of such lessee, the immediate source of which is the lease arranged by the Government. (*Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.)

But it is contended by the Government that the exclusion from federal taxation of the restricted tribal lands, and the income thereof derived by the Indian tribe, does not carry with it an exclusion of the lessee's share of the royalties.

No reason, however, is given in the one case (of Federal Income Taxes) which is not equally applicable to the other case (of State Income Taxes). Neither government will tax the property of the other "and from the nature of the case neither government will lay taxes upon its own property." 37 *Cyc.* 865.

Our proposition, therefore, is that the reasoning in *Gillespie* v. *Oklahoma, supra,* which impelled this Court to hold that a lessee of Indian tribal lands is exempt from *State* taxation of the income from such lands, determines the question as to the extent of the exemption *intended* by Congress in the *Federal* Income Tax statutes, by excluding them from the purview of the tax laws.

An analysis of the argument for the Government in the *Gillespie* case will, we believe, demonstrate this.

It is said that the income of the lessee is too remote to be included in the exemption of the lands; that it is a case of "the house that Jack built." But it does not appear why the "remoteness" of the lessee's income from the land itself, is any greater or less in the one case than in the other. Indeed, precisely the same argument, in substantially the same form, was made to this Court in *Gillespie* v. *Oklahoma*, where counsel for Oklahoma argued:

> "It is going far afield for courts to hold that to tax the lessee of a restricted Indian leasehold upon his share of gross production of oil and gas, or other mineral, is indirectly taxing the exercise of a federal agency, and is, therefore, invalid; but to go a step farther and say that to require such lessee to include in his income tax returns net income derived from such source imposes a like burden, would be carrying the idea of guardianship into too remote a channel to meet the practical application of taxing laws."

But this Court answered that it was not too remote and that where the land, itself, is immune, "an inquiry is allowed into the sources from which net income is derived, and if part of it comes from such a source, the tax is *pro tanto* void."

Again, it is now argued by the Government that a tax on the income of the lessee, in reality and as a practical matter, does not throw any burden on the Indian land and that leasing contracts for rents or royalties are not influenced by any consideration of taxes.

The same argument was unsuccessfully made by counsel for the State of Oklahoma with reference to State taxation in *Gillespie* v. *Oklahoma, supra*, as follows:

> "The theory upon which such contention is made is that such a tax would have a deteriorat-

> ing influence upon the purchasers of Indian leases. * * * To hold the tax a burden upon the lease would be to repudiate the entire scheme of net income taxation; that is, the net income regarded as a taxable subject-matter severed from its source."

This argument was answered by this Court:

> "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profit of the leases. * * *"

and again:

> *"The tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them."*

It is true that in the State tax cases the question of the effect of the tax on the lessor was discussed and decided in litigation that also involved the *power* to tax, whereas in the case at bar the question is one of *intent* and not of *power*. But a lease is a lease, whether looked at by State officers or Federal officers. A burden that is remote and one that is direct are not matters peculiar to State law or to Federal law, but are common to both.

If a tax on the income is a tax on the source, it is equally so, whether the tax be federal, state, territorial, county or city. The nature and effect of the tax is not changed because the taxing authorities can not, but do, tax in one instance, and do not, but could, tax in the other instance.

The real question is, what does an exemption, whether created by lack of power, or non-inclusion, of Indian land from taxation include? Does it include the income of the lands exempt from taxation? Does it exempt the income so received by a non-Indian lessee, when he

is an instrumentality of the United States in discharging a sacred trust?

All these questions have been settled by this Court. (*Gillespie* v. *Oklahoma*, 257 U. S. p. 501; *Thomas* v. *Gay*, 169 U. S. 264.) In these two cases (and the cases cited in them and the cases following them) this Court has pointed out what is "direct" and what is "too remote."

If, because the tribal lands of the Osage Indians, for whom the United States acts as trustee, are not within the purview of the income tax statutes, Congress has effectively exempted them from taxation, that exemption is as effective as if Congress had exempted the Indian lands by treaty with the Indians and, recognizing the paramount authority of the treaty (unless expressly repealed), had disclaimed an intention to repeal it.

Indeed, the reasons for exemption in the present case are stronger than those for exemption in the State cases. In the State cases, since they involve questions of constitutional power, there would be invoked the rule of resolving doubt in favor of the power and this principle would in the instant case conflict with another policy, that in dealings with the Indians, doubt is to be resolved in favor of the Indians and not against them. In the present case only the latter policy is involved as an aid to interpretation. That this rule of construction applies as between the Indians and the United States and that it applies in tax cases, is now well settled. In *Choate* v. *Trapp*, 224 U. S., 665, 675, this Court said:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved

> in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

VI.

The exemption of the Indian lands from Federal taxation grows out of treaty relations between the United States and the Indians. These treaties are the supreme law of the land. They supersede all prior acts of Congress. No repeal is inferred from general statutes. Ordinarily a repeal must be express and specific. Until this is done, the treaty remains the supreme law. Such repeals are never favored. A breach of good faith is not lightly imputed to Congress.

Such being the case, it is not to be presumed that Congress, by enacting a general tax law, intended to repeal a treaty or to modify it in any particular. A conflict between a special treaty and a general law is to be avoided, if any reasonable interpretation will avoid it. In construing the language of Congress, it may properly be assumed that Congress did not intend a gross breach of faith.

These considerations have given rise to the settled rule that general statutes of Congress are not to be taken as applying to the Indian tribal lands, unless it appears that the attention of Congress must have been particularly directed to the prior specific laws or treaties protecting the Indians. *Washington* v. *Miller*, 235 U. S. 422, 428.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 94, has never been questioned:

> "The Indian Tribes, being within the territorial limits of the United States, were not, strictly

> speaking, foreign States; but they were alien Nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those Tribes owed immediate allegiance to their several Tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. *General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.*"

The principles of interpretation, therefore, have logically the same basis in this case that they would have if Congress actually was without power to modify a treaty, or to take or burden the tribal property of the Indians. This consideration leads inevitably to the conclusion that there is no sound basis for the suggestion that the extent of exemption from State taxation (because of lack of State power to tax) must be founded on different principles than those applying to and determining the extent of an exemption from Federal tax (because not within the purview of the taxing statute).

If a different and narrower view is taken of *Gillespie* v. *Oklahoma, supra,* and it is considered as concerned solely with the proposition that the lessee of Indian land is an instrumentality of the Federal Government, which cannot be interfered with by the State, the result, so far as interpretation of the Federal income tax law is concerned, is the same. The question then would be whether the reasoning, denying the right to tax a

Federal instrumentality, should be applied in interpreting the intent of Congress to tax its own instrumentality.

Is not the question of the extent of the power to tax (which after all is determined by finding the intent in constitutional provisions and laws of Congress granting or withholding the power to tax) substantially the same as the extent of the authority to tax actually given or withheld by the laws of Congress, which is to be deduced from the presumed intent of Congress in the use of general language in the tax laws?

The contention of the Government as to the proper construction of the Federal tax law, as distinguished from the proper construction of the Constitution and laws governing the power of the States, would lead, if carried to a logical conclusion, to an absurdity. It would be that from the general language in the Federal Income Tax Statutes, taken in connection with the solemn promises to and treaties with the Indian tribes, we find a clear intent of Congress not to burden Indian oil lands at all by taxing the land or the income derived by the Indians, but that we must further read into the Income Tax law a limitation upon this clear intent by which the Government can reach and appropriate to itself part of the income from the Indian oil lands, if it arranges for their development by means of an instrumentality of its own, and divides with that instrumentality a part of the income. Of a somewhat similar argument on construction of legislative intent, this Court said (*Wright* v. *Central of Georgia Ry. Co.*, 236 U. S. 674, 679, 680):

> "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain

> by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor."

And in *Central of Georgia Ry.* v. *Wright*, 248 U. S. 525, 527, this Court said:

> "The taxes now attempted to be levied are upon the *leasehold interests of the lessee* in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the constitution of the State. But the constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that although the decision in the former case necessarily was confined to the question before the Court, *the reasoning applies with equal force to that now before us.*"

VII.

We invoke the principles as to the nature and extent of the tax exemption of the Indian land to be found in *Choate* v. *Trapp, supra*, taken in connection with *Fink* v. *Commissioners*, 248 U. S. 399.

From these cases it is clear that as long as the value to the Indians is the land itself (and prior to alienation, whereby *money* is substituted for the lands) any use made of the lands, by which their worth is realized, necessarily carries with it that tax exemption, which will give full and complete effect to the exemption of the lands themselves; and it is only when the lands are alienated (and all rights of the Indian are exchanged for other property) and passes to another, *on express condition that the tax exemption is to be lost and the lands are to be taxed in the hands of the purchaser*, that the exemption from taxation is to be affected or diminished.

In *Fink* v. *Commissioners* this Court, referring to *Choate* v. *Trapp*, said: "In that case the State of Oklahoma undertook to tax lands which were *yet in the hands of the Indians*," and the court answered that the "provision exempting from taxation was a property right," but that in the *Fink* case it would invade no right of the Indian "to make the alienation of the land a surrender of the exemption from taxation."

It must follow logically from the reasoning of the court that while the lands are yet in the hands of the Indians and before alienation and surrender of the lands themselves, the exploitation of the lands, to realize their value, could not be made a surrender of tax exemption, if the tax exemption of the lands themselves is to be preserved.

VIII.

The instant case involves only a question of the interpretation of tax laws, the fundamental rule for which is that tax statutes are, in case of doubt, "construed most strongly against the Government and in favor of the citizen," (*Gould* v. *Gould*, 245 U. S. 151, 153) and this is especially true in interpreting the Government's dealings with Indian lands. (*Choate* v. *Trapp*, 234 U. S. 665.)

Having in view the settled policy of the United States towards the Indians for more than a hundred years, the dealings with them in the form of treaties, and the guardianship relation by which the oil lands are held by the Government for the benefit of the tribes, do the laws of the United States, by the "clear import of the language used" (*Gould* v. *Gould*, *supra*) mean to exclude the Indian mineral lands from all taxation, State and Federal, direct or indirect, on the one hand, and on the other hand inconsistently authorize the Gov-

ernment to collect for itself a tax on the income of a lessee of such lands, the terms of whose lease were arranged by the Government itself in performance of its guardianship, although such a tax collected by a State would be taxing an instrumentality of the Government, would be burdening the land itself and would be a direct "hamper" on the Government in making advantageous terms for the Indians?

That is the question, as we conceive it, which is presented to this Court, and which this Court has already answered in the negative in *Gillespie* v. *Oklahoma, supra.*

On the authority of that decision, the question was also answered in the negative by both the District Court and the Circuit Court of Appeals. Their able opinions show that in any view the application of these laws to the income of a lessee is doubtful and as such should be resolved in favor of the Indian Tribes, for upon them the burden of the tax inevitably falls. Such being the case, this Court may well recall the language of Chief Justice Marshall in *Cherokee Nation* v. *Georgia, supra*:

> *"They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."*

Respectfully submitted,

JAMES M. BECK,
T. J. LEAHY,
As Amici Curiae.

APPENDIX.

Prior to the Louisiana Purchase the Osage tribe of Indians was under the jurisdiction of France, but by reason of that purchase they became subjects of the United States. On November 10, 1808, the United States entered into a treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (*Kappler's Laws and Treaties*, Vol. 2, p. 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "Art. 6. And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to wit: Beginning at Fort Clark, on the Mississippi, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States, all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the river Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be laid off in such manner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty, provides:

> "Art. 10. The United States receives the Great and Little Osage nations into their friendship and under their protection; and the said

> nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer their lands to any foreign power, or to citizens of the United States, or to inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Louisiana purchase on the part of the United States to assume the position of guardian of the Osage tribe.

On September 12, 1815, after the close of the War of 1812, the United States again entered into a treaty with the Osage tribe of Indians, for the purpose of re-establishing peace and friendship between the United States and the said tribe of Indians. (*Kappler's Laws and Treaties,* Vol. 2, p. 119.) The preamble to said treaty reads as follows:

> "The parties being desirous of re-establishing peace and friendship between the United States and the said tribe or nations, and of being placed in all things, in every respect, on the same footing on which they stood before the war have agreed to the following articles."

And article 3 reads as follows:

> "Art. 3. The contracting parties, in the sincerity of mutual friendship recognize, re-establish, and confirm, all and every treaty, contract and agreement, heretofore concluded between the United States and the said Osage tribe or nations."

Again on September 25, 1818, a treaty was entered into between the Osage Nation and the United States, whereby the Osage Nation ceded certain lands to the United States, and the United States agreed upon certain boundary lines as being the boundary line between the land owned by the Osage tribe of Indians and the United States. (*Kappler's Laws and Treaties*, Vol. 2, p. 167.)

The treaty of June 2, 1825 (*Kappler's Laws and Treaties*, Vol. 2, p. 217), contains the preamble:

> "In order to more effectually extend to said Tribes that protection of the Government so much desired by them, it is agreed as follows:"

Then follows a treaty consisting of fourteen articles. In the fourteenth article is found the language:

> "These articles shall take effect, and become obligatory upon the contracting parties, as soon as the same shall be ratified by the President by and with the advice and consent of the senate of the United States."

On January 11, 1839 (*Kappler's Laws and Treaties*, Vol. 2, p. 525) the United States entered into a treaty with the Osage tribe of Indians, article 3 of which reads as follows:

> "This treaty shall be binding on both parties when ratified by the United States Senate."

On September 29, 1865 (*Kappler's Laws and Treaties*, Vol. 2, p. 878) another treaty was entered into between the United States and the Osage tribe of Indians, article 10 of which expresses the dependency of the Osages upon the United States, and reads as follows:

> "Art. 10. The Osages acknowledge their dependency on the Government of the United

> States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians; and they further agree to use their best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

> "Art. 17. Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the Senate and approved by the President."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this act Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and Acts of Congress mentioned above establish the trust relation between the United States and the Osage tribe of Indians, but the United States as a further evidence of such relationship received from the Cherokee Nation in trust for the Osage tribe a deed for the lands, from which it now receives its mineral rights and these same minerals are now held by the

United States under such trust deed. The same thereby became a federal agency, by which the United States has endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to said tribe and held in trust by the United States.

It is specifically stated in said deed:

> "This indenture, made and entered into this fourteenth day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, Witnesseth, that * * *.
>
> Whereas, by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of one million, ninety-nine thousand, one hundred and thirty-seven and forty-one hundredths dollars ($1,099,137.41), in payment for said tract of land: * * *
>
> Therefore, by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three. * * *
>
> Said party of the first part, by the aforesaid principal chief, and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas river, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these

> presents bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships, and fractional townships, north and east of the Indian meridian. * * *."

Further evidencing the intention of the Government to retail control over the mineral resources of the tribe it is provided in the Act of Congress of June 28, 1906 (34 Stat. L., 539-543), as follows:

> "That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; And provided further, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; Provided, however, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

This is the only form of alienation of these minerals possible under the law.

SUPREME COURT OF THE UNITED STATES.

Nos. 219 and 220.—October Term, 1927.

D. B. Heiner, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,
219 *vs.*
The Colonial Trust Company, Executor of the will of Glenn T. Braden, deceased.

C. G. Lewellyn, former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,
220 *vs.*
The Colonial Trust Company, Executor of the will of Glenn T. Braden, deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent's decedent procured an oil lease from the Tribal Council of the Osage Tribe of Indians covering land of the Tribe in Oklahoma. The lease was in the form prescribed by the Secretary of the Interior and was approved by him. The lessor reserved as royalties an agreed percentage of the gross proceeds from the sale of the oil produced, to be paid to the Superintendent of the Osage Indian Agency. On the net income derived by decedent from the sale of the oil between 1917 and 1921 there were assessed and collected income taxes aggregating more than $800,000. Respondent brought these suits in the district court for western Pennsylvania to recover the tax paid, on the theory that, as the interests of the Indians were concerned, Congress had not intended by the various revenue acts to tax the income derived from the exploita-

tion of their lands by non-Indian lessees, and that it was thus impliedly exempt from the tax. Judgments of the district court for respondent [12 Fed. (2d) 481] were affirmed by the court of appeals for the third circuit [17 Fed. (2d) 36] and the cases are here on certiorari, the parties having stipulated that No. 220 shall abide the result in No. 219.

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

"That there shall be levied, assessed, collected and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax . . ."
at specified rates.

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917, (c. 63, 40 Stat. 300, 329) provides:

"That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains . . . growing out of the . . . use of or interest in real or personal property, . . . also [gains] from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The pertinent sections of the later revenue acts during the period do not differ materially from those quoted from the 1916 Act. Act of February 24, 1919, c. 18, §§ 210, 213, 40 Stat. 1057, 1062, 1065; Act of November 23, 1921, c. 136, §§ 210, 213, 42 Stat. 227, 233, 237.

These statutes in terms plainly embrace the income of a non-Indian lessee derived from the lease of restricted Indian lands. But we are reminded by respondent that both the lease here involved and the income it brings the lessee are beyond the taxing power of the states, for the lease is merely the instrument which the government has chosen to use in fulfilling its task of developing to the fullest the lands and resources of its wards, and a state may not by taxation lessen the attractiveness of leases for such a purpose, *Gillespie* v. *Oklahoma*, 257 U. S. 501; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; and see *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; and reliance is placed on those cases indicating that general acts of Congress are not applicable to the Indians where to apply them would affect the Indians adversely. *Washington* v. *Miller*, 235 U. S. 422, 427, 428; *Elk* v. *Wilkins*, 112 U. S. 94, 100.

The conclusion then urged on us is that Congress cannot be held to have intended by the general provisions of the revenue acts to tax the incomes of the Indians themselves; nor by taxing that of their lessees to do itself what the states are forbidden to do.

The power of the United States to tax the income is undoubted. It seems to us extravagant, in the face of the comprehensive language of the statute, to infer that Congress did not intend to exercise that power merely because, in the absence of congressional consent, it is one withheld from the states or because the tax in terms imposed on others may have some economic effect upon the Indians themselves. The disposition of Congress has been to extend the income tax as far as it can to all species of income, despite immunity from state taxation. During the period now in question the compensation of many federal officials was subject to federal income tax, and income from government bonds was taxed except when expressly exempted.

Assuming that the Indians are not subject to the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred, *Vicksburg, etc., R. R.* v. *Dennis*, 116 U. S. 665, 668; *Philadelphia & Wilmington R. R.* v. *Maryland*, 10 How. 376, 393, and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians.

It is not without weight that the Treasury Department from the beginning has consistently collected income tax from lessees of Indian oil lands running into vast amounts. If this was contrary to the intention of Congress it is reasonable to suppose that this practice of the Department would have been specifically corrected in some of the revisions of the laws taxing income in 1917, 1919, 1921, 1924 or 1926. Compare *National Lead Co.* v. *United States*, 252 U. S. 140, 145, 146.

Reversed.